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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1128

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA
Respondents,

v.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, State of Montana and the Montana Fish and Game Commission, Big Horn Rod & Gun Club, and Citizens Rights Organization,[1] respectfully pray that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 12, 1979, and modified on September 20, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals in *United States v. State of Montana*, 604 F.2d 1162 (9th Cir. 1979), appears as Appendix A. The opinion of the United States District Court for the District of Montana, *United States v. State of Montana*, 457 F. Supp. 599 (D.Mont., 1978), appears at Appendix B. Because the Court of Appeals adopted its opinion in *U.S. v. Finch*, 548 F.2d 822 (9th Cir., 1976), vacated 433 U.S. 676 (1977), on the river ownership issue, that opinion appears at Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 12, 1979. A timely petition for rehearing was denied on September 20, 1979, and a timely application for an extension of time within which to file this Petition was granted,

[1] On October 25, 1976, the District Court granted two local organization, Big Horn Rod and Gun Club and Citizens' Rights Organization, petitions to intervene. Both organizations identified themselves with the State and their positions are congruent with Montana's. They have joined in this petition.

extending time to January 20, 1980. This court's jurisdiction is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Whether the mere establishment of an Indian reservation within the Territory of Montana, with the usual assurances to the Indians thereon of exclusive use and occupancy, divests the subsequently admitted State of its constitutional right under the equal footing doctrine to hold title to the beds of navigable waters within the reservation.

2. Whether this Court's recent decision, *Wilson v. Omaha Indian Tribe,* ____U.S.____ 61 L. Ed.2d 153 (1979), requires ownership of riparian land within an Indian reservation to be measured by reference to state law.

3. Whether, in light of 18 U.S.C., §1165, and *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1979), an Indian tribe has the power to regulate non-Indian hunting and fishing on non-Indian owned fee lands within a reservation.

4. Whether a tribal resolution proscribing hunting and fishing by all non-members within the boundaries of an Indian reservation, including owners of fee patented lands within the reservation and which is enforced by federal officers, is so summary and arbitrary as to shock the conscience and thus constitute a taking of property without due process or a denial of equal protection, contrary to the Fifth Amendment to the United States Constitution.

5. Whether a tribal resolution proscribing hunting and fishing by all non-members within the boundaries of an Indian reservation, including fee patented lands within the reservation, violates 25 U.S.C., §1302(8) of the Indian Civil Rights Act.

6. Whether under Rule 52(a), Federal Rules of Civil Procedure, the lower court was justified in setting aside, *sub silentio,* those trial court findings which are supported by substantial, credible evidence.

TREATIES AND STATUTES INVOLVED

The following treaties and statutes are reproduced as appendices:

(1) Treaty of Fort Laramie, 1851, 11 Stat. 749 (Appendix D);

(2) Second Treaty of Fort Laramie, 1868, 15 Stat. 649 (Appendix E);

(3) General Allotment Act of February 8, 1887, 24 Stat. 388 (Appendix F);

(4) Crow Allotment Act of June 4, 1920, 41 Stat. 751 (Appendix G).

Other statutes and constitutional provisions involved are:

(1) Act of July 12, 1960, Public Law 86-634, 74 Stat. 869, 18 U.S.C., §1165, which provides:

> "Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited."

(2) The Enabling Act of Montana, February 22,

1889, 25 Stat. 676, which in pertinent part provides:

"An Act * * * to enable the people of * * * Montana * * * to be admitted into the Union on an equal footing with the original states * * *.

§4. * * * Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, * * *."

(3) The Fifth Amendment to the United States Constitution which in pertinant part provides:

"No person shall be * * * deprived of life, liberty or property, without due process of law."

(4) The Indian Civil Rights Act, Act of April 11, 1968, Public Law 90-284, §202, 82 Stat. 77, 25 U.S.C.§1302, which in pertinent part provides:

"No Indian tribe in exercising powers of self-government shall***

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; * * *."

(5) Rule 52(a), Federal Rules of Civil Procedure, which in pertinent part provides:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall

find the facts specially and state separately its conclusions of law thereon, * * *. Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT OF THE CASE

On October 13, 1973, the Crow Tribal Council passed Resolution 74-05, which proscribes hunting and fishing within the Crow Indian Reservation[2] by all non-members of the Crow Tribe, despite the fact that approximately 30 percent of the land within the reservation is owned in fee and approximately 43 percent of reservation residents are non-Indians. Because there are non-members who either reside on or who travel into the reservation, Montana continues to require such non-members to possess state hunting and fishing licenses and enforces, as against such non-members, all state fish and game statutes and regulations, including bag limits, seasons, and hours. However, Montana does not attempt to enforce any of its fish and game laws against tribal members, and it has consistently admitted that it has no jurisdiction over Indian hunting and fishing activities *within the reservation.*[3]

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[2] Resolution 74-05 is reproduced as Appendix H. The Crow Indian Reservation was first created by the Treaty of Fort Laramie of 1851, 11 Stat. 749. *The Crow Nation v. United States*, 284 F.2d 351 (Ct. Cl., 1960); the *Crow Nation v. United States*, 81 Ct.Cl. 238, 248 (1935). In 1868, it was diminished by the Second Treaty of Fort Laramie, 15 Stat. 649. By subsequent legislative acts, the reservation was further diminished to its present size of 2,282,764 acres. 604 F.2d, *supra*, at 1164 (Appendix A, p. 5).

[3] Montana did not choose to include the Crow Indian Reservation within jurisdiction granted it by Public Law 83-280, 67 Stat. 588, as amended. And the Crow Tribe has not requested the State to accept jurisdiction.

Non-Indians continued to assert their rights to hunt and fish free from Indian interference on fee lands within the reservation after Resolution 74-05 passed. This right was first challenged in 1974, when James Junior Finch was arrested while fishing in the Big Horn River from the banks of riparian land owned by the State of Montana and managed by the Department of Fish and Game for its citizens. He was charged with violating 18 U.S.C., §1165.

Finch was tried in District Court, and the criminal complaint was dismissed on the grounds that the bed of the Big Horn River was owned by Montana, and therefore, there was no violation of 18 U.S.C., §1165. *United States v. Finch*, 395 F.Supp. 205, 213 (D.Mont., 1975).

The United States appealed, and the Circuit Court reversed. On appeal, Finch contended that jeopardy had attached, and therefore, reversal and retrial were precluded. Finch continued to assert that the State owned the Big Horn River. The Circuit Court rejected Finch's double jeopardy argument and held that the Big Horn River, a navigable stream, was held in trust by the United States for the exclusive use and benefit of the Crow Indians. *United States v. Finch*, 548 F.2d 822 (Appendix C).

This court granted Finch certiorari, vacated the Circuit Court's judgment and remanded to that court with directions that the appeal be dismissed. *Finch, supra*, 433 U.S. at 677. Dismissal was granted on the grounds that jeopardy had attached when the information was dismissed. This court did not reach the question of river ownership.

The present action was initiated by the United States on October 9, 1975, to "parallel" the *Finch*

case.[4] The Crow Tribe was permitted to intervene. Their respective complaints sought to quiet title to the Big Horn River in the United States for the use and benefit of the Tribe; enjoin the State from licensing or regulating non-Indian hunting and fishing activities within the reservation; and for a declaration that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation.

Other issues raised by the parties and incorporated in the pre-trial order were: (1) Whether title to land riparian to the Big Horn River extends to low or high-water mark;[5] (2) whether fee patents to land within the reservation, without reservations or exceptions, and authorized by the Allotment Act of 1887,[6] and the Crow Allotment Act of 1920,[7] conveyed hunting and fishing privileges on or from the land conveyed;[8] (3) whether Resolution 74-05 constituted a taking of property without due process of law in violation of the Fifth Amendment to the United States Constitution and/or deprives non-Indians of equal protection of the law guaranteed by the Fifth Amendment;[9] (4) whether Resolution 74-05 violated the equal protection and due process guarantees of the Indian Civil Rights Act.[10]

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[4] United States' Brief to Ninth Circuit, p. 5.

[5] Appendix I, addendum to pre-trial order, paragraph 2.

[6] Appendix F.

[7] Appendix G.

[8] Appendix I addendum to pre-trial order, paragraphs 6 and 7.

[9] Appendix I, paragraph 8.

[10] Appendix I, paragraph 8.

After trial, the District Court held: (1) That the State of Montana owned the bed and banks of the Big Horn River to high-water mark; (2) that the State has exclusive authority to regulate non-Indian hunting and fishing activities on the Big Horn River and on all non-Indian fee land within the reservation; (3) that the United States has concurrent authority to regulate non-Indian hunting and fishing on tribal or Indian lands pursuant to 18 U.S.C., §1165; (4) that the Tribe possesses exclusive hunting and fishing rights only to those lands described in 18 U.S.C., §1165; and (5) that the Tribe retains the right to grant or deny hunting, fishing, and trespass privileges to non-Indians only on tribal or Indian lands. *United States v. State of Montana, supra,* 457 F.Supp. at 611 (Appendix B, at pp. 54-55).

The Circuit Court reversed and held, adopting its decision in *Finch, supra,* although recognizing the "issue is a close one * * * that within the exterior boundaries of the reservation" the United States holds title to the Big Horn River in trust for the Crow Tribe. 604 F.2d at 1166 (Appendix A, at p. 7).

The Circuit Court also held (1) that Resolution 74-05 was "a valid exercise of tribal power, except insofar as it attempts to proscribe all hunting and fishing" by non-members who reside upon fee lands within the reservation[11]; that the Tribe has the power to regulate hunting and fishing by non-members within the reservation, including its total proscription if not within the exception noted in (1), *supra*[12]; and (3) that the State of Montana has concurrent authority to regulate non-Indian hunting and fishing activities within the reservation so long as it does

[11] 604 F.2d 1165-1166 (Appendix A, pp. 7-8).

[12] 604 F.2d 1165 (Appendix A, p. 7).

not regulate indirectly hunting and fishing by tribal members, and such regulations have as their purpose "the conservation and proper management of game and fish" and do not impede proper tribal regulations.[13]

REASONS FOR GRANTING CERTIORARI

1. THE LOWER COURT'S RULING IS INCONSISTENT WITH CONTROLLING CASE LAW AND VIOLATES THE "EQUAL FOOTING" DOCTRINE ESTABLISHING OWNERSHIP OF NAVIGABLE BODIES OF WATER IN THE VARIOUS STATES.

As this Court has observed, Congress has constantly acted upon the theory that navigable waters and the soils under them:

> "* * * shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States * * *." *Shiveley v. Bowlby,* 152 U.S. 1, 49-50 (1894)

See also *Packer v. Bird,* 137 U.S. 661, 672 (1891). A disposal of lands underlying navigable waters during the territorial period is:

> "* * * not lightly to be inferred, and should not be regarded as intended unless the intention was *definitely declared or otherwise made very plain.*" *United States v. Holt State Bank,* 270 U.S. 49, 55 (1926) (Emphasis supplied.)

In the present case, the court below, adopting its decision in *United States v. Finch, supra* (Appendix C), found a public exigency in the mere establishment of an Indian reservation within the limits of

[13] 604 F.2d at 1166 (Appendix A, p. 8).

the Montana Territory,[14] although this court had in 1842 — 26 years before the Second Treaty of Fort Laramie — already established the doctrine that navigable waters are owned by the respective states. *Martin v. Waddell*, 41 U.S. 366 (1842).[15] The lower court totally failed to recognize that the fundamental reason for investing states with title to navigable waters is because those waters are so intimately linked to sovereignty that a presumption will be indulged against their separation from sovereignty. *United States v. Oregon*, 295 U.S. 1, 14 (1935).[16]

Further, the lower court failed to recognize that in regard to disposal of lands by the United States, those lands which underly navigable rivers must be accorded a special attention or treatment not demanded for lands not so situated. *Shively v. Bowlby, supra*, and *United States v. Holt State Bank, supra*. Furthermore, the trust in favor of the states which had been imposed upon the federal ownership of lands underlying navigable rivers had been in place long before the Treaties of Fort Laramie. By adopting the rationale of *Finch*, the lower court did not even purport to find any "definitely declared" or "very plain" intent relating, specifically, to the bed of the navigable Big Horn. Rather, it purported to interpolate an intent from: (1) a history of negotiations that related to *all* the lands encompassed within the reservation boundaries

[14] The Montana Territory was created in 1864. Act of May 26, 1864, 13 Stat. 85.

[15] This court failed to find the requisite intent to divest a State of ownership of navigable waters even in the very broadly and comprehensively worded grants to the Duke of York. 41 U.S. at 370, 414.

[16] This court has recognized but two sovereigns: The United States and the individual states. *Oliphant v. Suquamish Tribe of Indians*, 435 U.S. 191, 211 (1978).

without any regard to whether or not a navigable river bed was involved and without the distinguishing history dealt with in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); and (2) a resolution of alleged doubtful language in favor of the Indians where no relevant language existed at all; and (3) from treaty language which had been placed in so many other contemporaneous treaties as to be justifiably regarded as stereotype.[17] Such an approach, it is submitted, ignores the fact that the Second Treaty of Fort Laramie expressly and implicitly divested the Crow Tribe of Sovereignty over non-Indians.[18] It also ignores the special protection accorded navigable streams within states by judicial pronouncement such as *Shively* and *Holt, supra*, and by congressional action relating to such streams generally and particularly those within the Louisiana Territory, which included the Big Horn River.[19] Thus, a divesting of the state's right to title was "lightly inferred" as opposed to being found as "definitely declared or made very plain." Once having said, as did the lower court here, that "the issue is a close one," then the constitutional presumption vesting Montana with title to navigable rivers should have been the deciding factor. See pages 15, *et seq*, post.

The court in *Finch*, in discussing the Crow treaty of 1851, noted that its terms "fall far short of constituting an express grant of all lands, including the beds of navigable streams." (Appendix C p. 71.) It then

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[17] See footnote 25, *post*.

[18] See Articles 1, 5 and 6, Second Treaty of Fort Laramie, Appendix E.

[19] Act of May 18, 1796, 1 Stat. 468, 43 U.S.C.§ 931; Act of March 3, 1811, 2 Stat. 606, 33 U.S.C. §10.

turned to the Treaty of 1868.[20] The court relied almost exclusively upon two portions of Article 2 of that treaty for its holding that title to the bed was conveyed therein. These provisions guaranteed the Tribe "absolute and undisturbed use and occupation" and that "no person, except those herein designated and authorized to do so * * * shall ever be permitted to pass over, settle upon, or reside in" the reservation.[21] This language was used in numerous other treaties with tribes such as the Navaho, Ute, Cheyenne, Sioux, Arapahoe, Kiowa, Comanche and Shoshoni.[22]

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[20] The court first noted that the purpose of the 1868 treaty was to reduce the size of the Tribe's territory, citing this as a similarily to the *Choctaw* case where treaties were entered into for the same purpose. The court ignored the fact that the treaties discussed in *Holt State Bank* were also for that purpose. *Holt State Bank, supra,* at 58.

[21] The Court also relied on Art. 11 of the treaty, setting forth the requirement for obtaining a future cession agreement from the Tribe, as showing that the United States "recognized the extensive ownership rights" of the Tribe. Similar recognition was shown in the *Holt State Bank* situation, in the Act of January 14, 1889, 25 Stat. 642, which required the Chippewas' consent to a cession. These provisions should be contrasted with the *Choctaw* situation where no future cession was contemplated. The provision for a future cession by the Tribe is thus a factor which places the present case in the category of *Holt State Bank* and many other reservations, rather than the exceptional situation of *Choctaw.*

[22] Treaty with the Navaho, 1868, 2 Kapp. 782; Treaty with the Utes, 1868, 2 Kapp. 765; Treaty with the Sioux Bands, 1858, 2 Kapp. 770; Treaty with the Shoshoni and Bannock, 1858, 2 Kapp. 786-787; Treaty with the Cheyenne and Arapahoe, 1867, 2 Kapp. 760, 761; Treaty with the Kiowa and Comanche, 1867, 2 Kapp. 754, 755. Language nearly identical to that found in Art. 2 of all of these treaties and the Crow treaty is also found in numerous other treaties. See *inter alia,* Treaty with the Klamath, Modoc and Snake Bands, 1864, 2 Kapp. 865; Treaty with the Cheyenne and Arapahoe, 1865, 2 Kapp. 887, 888; Treaty with the Comanche and Kiowa, 1865, 2 Kapp. 892, 893.

All of the 1867 and 1868 treaties cited above also contained the provision regarding future cessions, found in Art. 11 of the Crow treaty, on which the court below also relied. This provision was considered by this court in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), as it appeared in the 1868 Sioux treaty.

Such language is not indicative of the kind of exceptional public exigency that was involved in *Choctaw, supra.* It merely indicates the establishment of an Indian reservation, as was done in *Holt State Bank, supra.* Compare *Minnesota v. Hitchcock,* 187 U.S. 373, 389 (1902), (*Holt* reservation was "a reservation within the accepted meaning of the term") with *Atlantic & Pacific Rr. Co. v. Mingus,* 165 U.S. 413, 435-436 (1897), (*Choctaw* reservation was "for most purposes * * * to be considered as an independent country"). In *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1969), this Court found such a public exigency, based on the unique history of the federal government's dealings with the Choctaw and Cherokee Indians. *Choctaw, supra,* at 622-626. The court found the requisite "very plain" intent in the fact that the land was conveyed to the Indians in fee simple and in the treaty provision that the land would never be "embraced in any Territory or State." *Choctaw, supra,* at 634-635.[23]

The facts in this case are totally inapposite to *Choctaw* because in this case: (1) The entire region which was originally made a part of the Crow Indian Reservation was not conveyed to the Crow Tribe;[24]

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[23] In a recent case, this Court disparaged a contention that an Indian tribe held title to a navigable river bisecting its reservation despite treaty language nearly identical to that relied upon by the lower court in this case. *Puyallup Tribe, Inc. v. Washington Game Department,* 433 U.S. 165, 174, n. 12 (1977).

[24] The guarantees of tribal exclusivity which were persuasive in *Choctaw* are totally absent here. Instead of fee simple title only "use and occupation" were conveyed. Art. 2, Treaty of May 7, 1868, 15 Stat. 650. Art. 6 of the treaty contemplated allotment of lands to the Indians. *Id.,* at 651. Subsequently, vast areas of land were ceded to the United States. Act of April 11, 1882, 22 Stat. 42; Act of July 10, 1882, 22 Stat. 157; Act of March 3, 1891, 26 Stat. 989; Act of February 12, 1889, 25 Stat. 660; Act of June 4, 1888, 25 Stat. 167; Act of April 27, 1904, 33 Stat. 352. Finally, on June 4, 1920, 41 Stat. 751, the Crow

(2) there were no assurances of self-government extended to the Crow Tribe of Indians; (3) there were no pledges to the Crow that their new homeland would never be part of any state; and finally, (4) fee simple title to the land was retained by the United States, and thus, the Indian title was one of use and occupancy as opposed to fee simple.[25]

When Montana became a state in 1889, the fee to the Big Horn River was owned by the United States. The rationale of *Holt* is that "under the constitutional principle of equality among the several states, the title to Mud Lake then passed to the state * * * if the bed had not already been disposed of by the United States." *Holt, supra,* at 55.

This "constitutional principle of equality" upon which *Holt* was dependent has been given renewed vitality in *Oregon v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977). *Corvallis* holds that the State of Montana, upon its admission to the Union, received absolute title to the beds of navigable waterways within its boundaries:

> "Citing *Martin v. Waddell,* 16 Pet. 410, 10 L.Ed. 997 (1842), the Court noted that the original States held the 'absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.' How.,

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Allotment Act was passed and out of a total reservation land area of 2,282,764 acres, only 395, 591.49 acres remain as tribal lands. By the same Act, the State of Montana received fee simple title to Sections 16 and 36 as school grant lands for a total of 44,804.82 acres. *Id.,* 41 Stat. 756. Some of these school grant lands straddle the Big Horn River and encompass its bed and banks. 457 F.Supp. at 602 (Appendix B,p. 34.)

[25] The "use and occupancy" title of the Crow is nearly identical to the title held by the Chippewas which was insufficient to convince this court to vest title in Mud Lake in that tribe. *United States v. Holt State Bank, supra; Minnesota v. Hitchcock,* 185 U.S. 373 (1902).

at 229, 11 L.Ed. 565. The Court then concluded:

'First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy * * * *Id., at* 230, 11 L.Ed. 565.'

In so holding, the Court established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party was capable of defeating.

Thus under Pollard's Lessee the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself." (Emphasis supplied.) 429 U.S. at 373, 374.

The Enabling Act admitting the State of Montana to the Union stated that it was "to be admitted into the Union on an equal footing with the original states."[26] The lower court completely disregarded the equal footing doctrine established by this court in *Pollard's Lessee v. Hagan,* 3 How. 212 (1845), reconfirmed in *Corvallis* and predicated its decision upon a thin tissue of treaty language.

The likely result of allowing the lower court's decision to stand will be to eventually divest Montana and other states of title to the beds of countless

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[26] Act of February 22, 1889, 25 Stat. 676.

navigable rivers and lakes throughout the western United States. Some states would be deprived of the beds of most of the navigable waters within their boundaries.[27] This would virtually eviscerate the equal footing doctrine in these states — a result, we believe, this Court did not countenance by its *Choctaw* decision.

2. THE LOWER COURT'S DECISION CONFLICTS WITH THIS COURT'S RECENT HOLDING IN *WILSON V. OMAHA INDIAN TRIBE*, ____U.S.____, 61 L.ED.2d 153 (1979).

The District Court held Montana owned title to the Big Horn River to high-water mark,[28] although the State had contended riparian ownership extended to low-water mark. Since the judgment granted the State ownership to the *entire riverbed*, no appeal was taken from that holding. However, Montana continued to assert to the lower court that a riparian owner owns to low-water mark under state law applied as a federal rule.[29] Prior to petitioning for rehearing, the lower court, following its decision in *Finch, supra*, held the Tribe owned to high-water mark. Montana petitioned for rehearing, citing *Wilson v. Omaha Indian Tribe, supra*, for the proposition that the federal court, in fashioning a federal rule, should refer to state law.

In denying rehearing, the court reasoned that a

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[27] To give one example, the Treaty with the Sioux bands which created the Great Sioux Reservation, covering all of South Dakota west of the Missouri River was negotiated and signed at the same place and within one week of the Crow treaty construed below. It contained all of the provisions which the court below found to be determinative. 2 Kapp. 770, 774.

[28] 457 F.Supp. at 611 (Appendix B, p. 54).

[29] Respondent's Brief to Ninth Circuit, pp. 57-60.

contrary holding would frustrate "federal policy and functions." (Appendix A. p. 25) But in *Wilson*, this court held that questions of riparian ownership would be governed by the State rule in two different contexts: First, when the subject land was granted away by patents,[30] and secondly, when the subject land was still within the confines of a reservation.[31]

This case most nearly approximates the first situation exemplied by *Oklahoma v Texas*, 258 U.S. 574 (1922), and its progeny, [32] for here, the United States issued patents "granting former reservation lands."[33] As this court said in *Wilson:* "[I]n this case several hundred acres of land within the Barrett survey are held in fee, and concededly are not Indian property. These tracts would not be governed by the federal rule announced by the Court of Appeals." 61

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[30] *Wilson, supra*, 61 L.Ed.2d at 168-169.

[31] *Wilson, supra*, 61 L.Ed.2d at 170-173.

[32] *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88-89 (1922); *United States v. Champlin Refining Co.*, 156 F.2d 769, 773 (10th Cir., 1946), aff'd 331 U.S. 788-789 (1947); *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 209-210 (1942); compare *Whitaker v. McBride*, 197 U.S. 510 (1904). The rule articulated in the cited cases has been consistently applied in similar controversies-some involving former Indian lands. See, e.g., *Hardin v. Shedd*, 190 U.S. 508, 509 (1902); *Shiveley v. Bowlby*, 152 U.S. 1, 45 (1894); *Hardin v. Jordan* 140 U.S. 371 (1891); *Packer v. Bird*, 137 U.S. 661 (1891); *Choctaw & Chickasaw Nations v. Board of County Commissioners*, 361 F.2d 932, 933 (10th Cir., 1966); *Choctaw & Chickasaw Nations v. Seay*, 235 F.2d 30, 35 (10th Cir., 1956); *Herron v. Choctaw & Chickasaw Nations*, 228 F.2d 830, 832 (10th Cir., 1956); *United States v. Elliott*, 131 F. 2d 720, 723 (10th Cir., 1942); *Shore v. Shell Petroleum Corp.*, 55 F.2d 696, 202, aff'd 60 F.2d 1, 2 (10th Cir., 1932); *United States v. Hayes*, 20 F.2d 873 889-890 (8th Cir., 1927), cert.den. 275 U.S. 555; *United States v. Heinrich*, 12 F.2d 938, 939 (D.Mont., 1926). While as pointed out in *United States v. Oregon*, 295 U.S. 1, 27-28 (1935), the construction of federal grants is initially a federal question, the federal courts traditionally defer to state rules of construction.

[33] *Wilson, supra*, footnote 18, 61 L.Ed.2d at 169.

L.Ed.2d at 170-171.

But even were the court to apply the second *Wilson* rule, state law would still control because there is no need for "a uniform national rule" to determine riparian ownership, and it is an area in which the State has a substantial interest "in having their own law resolve controversies such as these." 61 L.Ed.2d, *supra*, at 170.

Montana law declares that an owner of land riparian to navigable waters owns to low water mark "except where the grant * * * indicates a different intent." 70-16-201, Montana Code Annotated; *Fawcette v. Dewey Lumber Co.*, 82 Mont. 250, 266 P. 646 (1928); *C. F. Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 P. 702 (1921); *Gibson v. Kelly*, 15 Mont. 417, 422, 39 P. 517 (1895). The patent under which the state owns its riparian land "indicates (no) different intent."[34] The lower court's error in failing to properly interpret and apply *Wilson* in this case merits review.

3. THE COURT'S DECISION EXTENDING INDIAN CONTROL OVER NON-INDIAN FEE LANDS, IS IN DIRECT CONFLICT WITH THE PRINCIPLES ENUNCIATED IN *OLIPHANT V. SUQUAMISH INDIAN TRIBE* AND THE PROVISIONS OF 18 U.S.C. §1165.

Relying upon those treaty construction standards

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[34] The granting clause in Muskrat's patent states: "NOW KNOW YE That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, there-unto belonging,unto the said claimant and to the heirs and assigns of the said claimant forever, and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States."

which require treaties and Indian laws to be construed liberally in favor of the Indians, and relying upon the fact that Congress had not specifically conveyed hunting and fishing rights to non-Indians, the lower court held that the Crow treaties "augmented" by 18 U.S.C., §1165, conferred in the Tribe authority to regulate non-Indian hunting and fishing on fee lands in two respects: (1) non-distriminatory regulation of resident fee owners; and (2) total regulation, including proscription of non-resident fee owners.[35]

In extending civil regulatory authority over non-Indians on fee lands, the lower court ignored the treaty language which implicitly divested the Tribe of jurisdiction over non-Indians and ignored the Tribe's own interpretation of its authority.[36]

Moreover, the legislative history of 18 U.S.C., §1165, clearly reflects the fact that Congress was concerned that Indians did not have the protection of any law which gave them control over *their lands. Oliphant, supra,* 435 U.S. 191, at pp. 205-206. Section 1165 was passed to fill that vacuum. However, Congress was cognizant of those decisions holding that "extinguishment" of Indian title can effectively divest Indian and federal jurisdiction[37] and impose state rules to measure the incidents of ownership at-

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[35] 604 F.2d at 1165-1166 (Appendix A, pp. 7-8).

[36] See footnote 20, *supra.* Joe Medicine Crow, Tribal Historian, testified that a fee patent conveyed to the owner hunting and fishing privileges and the right to regulate the same. Tr. 150.

[37] See, e.g., *Bates v. Clark,* 95 U.S. 203, 208 (1877); *Ex Parte Crow Dog,* 109 U.S. 556, 561 (1883); *Clairmont v. United States,* 225 U.S. 551, 557 (1911). See also Montana's Enabling Act, *supra,* p. 4 and cf. *Ward v. Racehorse,* 153 U.S. 504 (1895), and *Draper v. United States,* 164 U.S. 240 (1896).

taching to federal patents.[38] Thus, it specifically eschewed an opportunity to expand the scope of §1165 to include 18 U.S.C. §1151, "Indian Country." See Appendix J.

As articulated by this court in *McClanahan v. Arizona Tax Court*, 411 U.S. 164, 172 (1973), the "trend" is away from the "idea of inherent Indian sovereignty" and "toward reliance on federal preemption." Section 1165 is indicative of this trend, because trespass is only punishable with reference to §1165 lands — Indian lands. If indeed Indian tribes possess "inherent sovereignty," that sovereignty must attach to their own lands — yet Congress felt it necessary to protect those lands wherein their sovereignty would reign most supreme but did not extend it to lands where tribal authority would be challenged.

The lower court's holding that §1165 augmented the 1868 treaty also violates the cardinal rules of statutory construction. In all cases involving construction of a statute, this court relies chiefly upon the language of the Act itself.[39] The language of §1165 refers only to land belonging to an Indian tribe, Indian trust lands, or lands of the United States "reserved for Indian use."

If the language is ambiguous, the court then must look to the legislative history of the Act.[40] However,

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[38] *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677 (1974); *Packer v. Bird*, 137 U.S. 661, 669 (1891); *Antler v. Land Co. of Wyola*, 507 F.2d 940, 943 (9th Cir., 1974), cert. den. 421 U.S. 992.

[39] *Chemehueui Tribe v. F. P. C.*, 420 U.S. 395, 400 (1975); *United States v. Standard Brewery*, 251 U.S. 210, 217 (1920); and *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917).

[40] *Chemehueui Tribe, supra*, at 405; *Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-401 (1966).

as noted above, Congress rejected a proposal to expand §1165 to include non-Indian fee lands or to make it co-extensive with the definition of "Indian Country" contained in 18 U.S.C., §1151. *Oliphant, supra;* letter from Indian Commissioner, John Crow, to John W. Cragun, Appendix J.

If the "primary" evidence of congressional intent is still not conclusive, then the court has consulted "secondary sources," and an interpretation "made at or soon after the time of enactment" must be "given special consideration since it was made at a time when the circumstances leading up to enactment of the statute are well known."[41]

The record in this case reflects uniform interpretation of §1165 by federal and state authorities, including written memoranda by Interior solicitors[42] and cautionary admonitions to the Tribes[43] that §1165 did not embrace non-Indian owned fee lands.

Since the notion of "Indian sovereignty" has given way to "federal preemption," the lower court was clearly in error in holding that the 1868 treaty "augmented" by §1165 supported Resolution 74-05. The clear intent of Congress as expressed in the Act itself, as reflected in congressional history, and finally as interpreted by federal agencies, should have inexorably led the lower court to affirm the district court's jurisdictional judgment. The lower court's total approval of Resolution 74-05 vests the Tribes with authority specifically withheld by Congress and totally inconsistent with "their

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[41] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). See also *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976).

[42] Fish and Game Exhibit 9.

[43] Crow Tribe Exhibit 71-rr.

dependent status."[44] For that reason, review is essential.

4. THE LOWER COURT'S APPROVAL OF THE TRIBE'S SUMMARY AND ARBITRARY REGULATION OF A NON-MEMBER FEE OWNER'S HUNTING AND FISHING PRIVILEGE SHOCKS THE CONSCIENCE AND VIOLATES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Resolution 74-05 operates only against non-tribal persons. Tribal members are free to hunt and fish free of any tribal, state, or federal regulation. The effect of the lower court's decision was to approve confiscation of a valuable property right which would have normally attached to a non-Indian's fee land — the privilege of reducing to possession game and fish which abounds thereon.[45] This holding is directly contrary to the principles underlying recent Supreme Court cases.

The 19th century fiction that a state owns title to wild fish, animals, and birds within its boundaries was recently dissipated by this court. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284-285 (1977); *Hughes v. Oklahoma*, ____U.S.____, 60 L. Ed.2d 250, 263 (1979). A similar conclusion was drawn by the Department of the Interior vis-a-vis Indian tribes. 78 I.D. 101 (1971). During 1976, the

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[44] *Oliphant, supra*, 435 U.S. at 207-208.

[45] As noted in *Wlson, supra*, and cases cited at page 18, *supra*, the incidents of ownership attaching to a federal patent are measured by state law. In Montana, a landowner posesses an exclusive right to hunt on his land and to fish non-navigable streams and navigable streams to low-water mark which flow through his land. *Herrin v. Sutherland*, 74 Mont. 587, 601, 241 P. 328 (1925); cf. 70-2-111, M.C.A. This court has likewise recognized an exclusive riparian fishery right. *Hardin v. Jordan*, 140 U.S. 371, 384 (1890); *Holyoke Co. V. Lyman*, 15 Wall. 500, 512-513 (1873).

opinion was withdrawn and not replaced.[46]

This is not a case in which non-residents seek to acquire a state's fish and game, such as this court studied in *Baldwin v. Montana Fish & Game Com'n*, 436 U.S. 371 (1978). Landowners (whether residents of the reservation or not), their guests, and employees living on or visiting the reservation are citizens of the State of Montana, within which the Crow Reservation is located and own land there pursuant to federal law and federal patents. See footnotes 32 and 34, *supra*.

The privilege to reduce to possession fish and game located on one's land is recognized as a property right under Montana law. *Herrin v. Sutherland*, 74 Mont. 587, 601, 241 P. 328 (1925). Both the Tribe and the United States have so contended in this case.[47] But regardless of whether classified as a "right" or a "privilege," it is still a right subject to constitutional protection. Compare *Graham v. Richardson*, 403 U.S. 365, 374 (1971). Neither the district court nor the lower court found that Resolution 74-05 was predicated upon any legitimate tribal interests such as conservation.[48] Compare *Douglas v. Seacoast Products, Inc., supra*, 431 U.S. at 285.

This court held in *Baldwin, supra*, 436 U.S. at 390-391, that to pass Fourth and Fourteenth Amend-

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[46] A similar withdrawal without public comment was noted by this court in *Oliphant v. Suquamish Indian Tribe, supra*, 435 U.S. 191, 201, note 11 (1978).

[47] United States brief to Ninth Circuit, p. 13; and Crow Tribe brief, p. 46.

[48] The State of Montana was instrumental in stocking reservation streams with fish and the land with up-land game birds. Montana-planted-game migrate into the reservation, and the elk herd migrates into and out of the reservation. 457 F.Supp. at 605. Appendix B, p. ____.

ment constitutional muster, regulation must be "rationale." Compare *Hughes v. Oklahoma, supra,* 60 L.Ed.2d at 262-263. Rationality in *Baldwin* was confirmed because non-resident hunters create greater enforcement problems. 436 U.S. at 391. But the lower court found no such rationality supporting Resolution 74-05. It relied solely upon exclusivity guaranties included within the Treaty of 1868 augmented by 18 U.S.C. §1165. However, the lower court's rationale failed to properly recognize that exclusivity had been significantly diluted by the 1887 and 1920 Allotment Acts and 18 U.S.C. §1165 was not co-extensive with reservation boundaries.

Although this Court stated that neither the Fifth or Fourteenth Amendments[49] operate upon Indian tribes' powers of self-government (*Santa Clara Pueblo v. Martinez,* 436 U.S.. 49, 56 (1978)), it has also recognized the rights of its citizens to be free from "unwarranted intrusions on their personal liberty." *Oliphant v. Suquamish Indian Tribe, supra,* 435 U.S. at 210. The lower court in an earlier case held that while the Fourteenth Amendment might not apply to tribal courts; nevertheless, even vis-a-vis a tribal member, Indian regulation may be so "summary and arbitrary as to shock the conscience of the federal court or goes beyond the scope of authority contemplated" by treaty. *Settler v. Yakima Tribal Court,* 419 F.2d 486, 489 (9th Cir., 1969) cert.den. 398 U.S. 903 (1970).

Resolution 74-05 was submitted to the Bureau of Indian Affairs for review, and the Area Director advised the Tribe that 18 U.S.C. §1165 did not encompass fee patented lands within the reservation. Crow

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[49] Fourteenth Amendment protections are embraced within the Fifth. *Schneider v. Rusk,* 377 U.S. 163 (1964); *Shapiro v. Thompson,* 394 U.S. 618, 641-642 (1969); *Washington v. Davis,* 426 U.S. 229 (1976).

Tribe Exhibit 71-rr. At that time, the Area Director should have advised the Tribe that the resolution was also beyond the authority of the Tribe to enforce. By not addressing that matter, in essence, federal approval was given to the resolution. Moreover, tribal wardens have been deputized by the federal government and enforce Resolution 74-05 as agents of the federal government. Transcript, p. 252-253; compare *Santa Clara Pueblo v. Martinez,* 436 U.S., *supra,* at 56, n. 7; *Settler v. Yakima Tribal Court, supra,* 419 F. 2d at 489; and *Colliflower v. Garland,* 342 F. 2d 369 (9th Cir., 1965). Thus, in essence, federal agents enforce a patently discriminatory and confiscatory regulation so "summary and arbitrary" as to "shock" one's conscience and violate the Fifth Amendment. Approbation of such a resolution enforced by federal sanctions merits review.

Finally, the lower-court-created dichotomy between resident and non-resident fee holders was clearly an effort to compromise or dilute the impact of approving a facially discriminatory and confiscatory resolution. In fashioning this type distinction, the lower court utterly failed to recognize that property rights attaching to fee patents are not salesroom "extras." The non-resident fee owner is still a citizen of Montana and the United States. His title is derived from the Federal Government, and he owns his land not by virtue of where he lives, but by virtue of a federal patent. With that patent are conveyed all concomitant property values which are attached to land by state law. See page 21 and footnote 38, *supra.* These property values cannot be emasculated by an accident of residence. The creation of such an inventive classification is alone sufficient to merit review.

5. THE LOWER COURT'S DECISION APPROVING RESOLUTION 74-05 VIOLATES THE INDIAN CIVIL RIGHTS ACT.

Resolution 74-05 only proscribes hunting and fishing by non-members within the reservation. As stated at page 25, *supra*, neither the district court nor the lower court found any facts supporting the need for its enactment. Fish and some types of game are stocked by the state. Virtually all of the trout found in the Big Horn River are exotic, not indigenous, species. Big game migrate into and out of the reservation. 457 F.Supp. at 605 (Appendix B,p. 39.) Indians and non-Indians alike have ignored bag limits and good rules of game conservation. Transcript 257, 258, 313, 324-325. Thus, there was absolutely no supporting basis upon which the flagrantly discriminatory resolution could be predicated.

25 U.S.C.§1302(8) prohibits an Indian tribe in exercising powers of "self government", from denying "any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; * * *."

The key words, of course, are "powers of self government" and "persons within its jurisdiction." The congressional history of the Indian Civil Rights Act (ICRA) as studied by this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61-71 (1978), does not support the conclusion that the ICRA encompassed non-Indians within its protections. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, declares that Indian tribes have been divested of criminal jurisdiction over non-Indians, but nevertheless, the court commented that the ICRA extended certain procedural rights to "*anyone*" tried in tribal courts. 435 U.S. at 212. *Oliphant, supra*, and *United States v. Wheeler*, 435 U.S. 313 (1978), also hold that other powers of Indian tribes have been both expressly

and implicitly divested.

The Treaty of 1868 specifically expresses the diminution of Crow authority over non-Indians. The Allotment Acts of 1887 and 1920 are the legislative means by which Indian title to lands within the reservation have been "extinguished."[50] Thus, the requisit jurisdiction supporting ICRA protection may be lacking. However, circuit courts have held that the ICRA does include non-Indians. See, e.g., *Dry Creek Lodge, Inc. v. United States,* 515 F.2d 926, 933-934 (C.A.10th, 1975); *Berry v. Arapaho & Shoshone Tribes,* 420 F.Supp. 934, 939 (D.Wyo., 1976). If it does, then Resolution 74-05 is discriminatory and confiscates property rights. If it does not, then this Court's interest in protecting all of its citizens from "unwarranted intrusions upon their liberties" expressed in *Oliphant, supra,* 435 U.S. at 210, would require that the lower court's decision be reviewed to eliminate conflicting decisions and to ensure that non-Indian property rights within a reservation are protected.

6. THE LOWER COURT'S DECISION VIOLATES RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE.

In reviewing questions involving whether navigable waters are owned by the several states, *Martin v. Waddell,* 41 U.S. 366, 417 (1842); *Skokomish Indian Tribe v. France,* 320 F.2d 205, 212 (9th Cir., 1963); whether Indian reservations have been diminished, *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 604-605 (1977); and whether tribal jurisdiction has given way to state jurisdiction, *Puyallup Tribe, Inc. v. Washington Game Department,* 433

[50] Montana's authority over Indian lands limited only until title "extinguished." Enabling Act, p. 4, *supra.*

U.S. 165, 175 (1977), this court and the lower court have carefully scrutinized not only federal legislation and treaties, but also how the respective parties have interpreted and applied such legislation and treaty language.

The district court, in arriving at his decision, said: "an extensive and laudatory record has been made." 457 F.Supp. 600 (Appendix B, p. 29). He felt he was not bound by the lower court's decision in *United States v. Finch*, 548 F.2d 822 (Appendix C), because this Court had vacated the lower court's judgment in that case and directed that court to dismiss the appeal (433 U.S. 676 (1978)), and was confident that the lower court "will find, on the record made here, that the bases for its earlier decision are not supported by the record." 457 F.Supp. 600-601, n. 1 (Appendix B, pp. 29-30).

The district court made extensive findings of fact which bore upon the issues of river ownership.[51] He also studiously examined how fish and game management within the reservation had been administered in the past, including a study of the federal-state-Indian jurisdictional trichotomy.[52]

The lower court has held that district court fact findings are binding upon its appellate review power unless clearly erroneous.[53] Rule 52(a), Federal Rules of Civil Procedure, as interpreted by this Court, en-

[51] E.g., that the Tribe did not use the Big Horn River for travel nor was the Tribe dependent upon fish or fishing. 457 F.Supp. 602. (Appendix B, pp. 32-33.) Compare *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Skokomish Indian Tribe v. France, supra*, 320 F.2d at 212.

[52] See, e.g., 457 F. Supp. 604-605, 610 (Appendix B, pp. 38-39, 52-53).

[53] *Skokomish Indian Tribe v. France, supra*, 320 F.2d at 212; *Beaver v. United States*, 350 F. 2d 4, 7 (9th Cir., 1965) cert.den. 382 U.S. 937 (1966).

joins an appellate court from setting aside a district court's findings unless "clearly erroneous."[54] Nevertheless, the lower court totally ignored such factual findings in this case and reversed upon issues which were clearly dependent upon those findings. The lower court did not characterize any of the district court findings as insubstantial, incredible, or against the great weight of the evidence, nor would the record support any such characterization. The lower court's failure to give proper deferrance to the district court's findings in this case merits review.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED THIS ____ day of January, 1980.

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[54] *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949); *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 495-496 (1950); *United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952).

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79-1128

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79 .....

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA

Respondents,

v.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,

Petitioners.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

AMENDED OPINION

UNITED STATES v. STATE OF MONTANA

The UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Appellants'

v.

The STATE OF MONTANA, Montana State Fish and Game Commission, Willis B. Jones, Arnold Rieder, Arthur C. Hagenston, Joseph H. Klabunde, W. Leslie Pengelly, and Wesley R. Woodgerd,

Appellees

Nos. 78-2917, 78-2865

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

JUNE 12, 1979

As Modified on Denial of Rehearing

Sept. 20, 1979

The United States, in its own right and as fiduciary on behalf of the Crow Tribe of Indians sought to quiet title to the bed and banks of Big Horn River. The United States District Court for the District of Montana, James F. Battin, J., 457 F. Supp. 599, declared that the State of Montana owned the bed and banks of the Big Horn River and that it had power and authority to regulate hunting and fishing by non-Indians within the exterior boundaries of the Crow Indian Reservation. On appeal, the Court of Appeals, Sneed, Circuit Judge, held that: (1) title to bed and banks of Big Horn River on Reservation is held in trust by United States; (2)

---

*The Shoshone Indian Tribe and the Assinibone and Sioux Tribes filed a brief as *amicus curiae* urging reversal.

resolution of Tribe regulating hunting and fishing was valid except as to nonmembers of Tribe on fee patent lands on which such nonmembers reside; (3) Tribe had power to regulate hunting and fishing on Reservation by nonmembers of Tribe subject to certain limitations, and (4) State of Montana also had power to regulate hunting and fishing on Reservation by nonmembers of Tribe subject to certain limitations.

Reversed and remanded.

Steven E. Carroll, Atty., U.S. Dept. of Justice (argued), Washington, D. C., for the U.S.

Urban L. Roth, Sp. Asst. Atty. Gen. (argued), Butte, Mont., for State of Mont.

Thomas K. Schoppert (argued), Lynaugh, Fitzgerald, Schoppert, Skaggs & Essman, Billings, Mont., for Crow Tribe of Indians.

Appeal from the United States District Court for the District of Montana at Billings.

Before SNEED and ANDERSON, Circuit Judges, and D. WILLIAMS,** District Judge.

SNEED, Circuit Judge:

This is an appeal by the United States and the Crow Indian Tribe (appellants) from a final declaratory judgment entered by the district court (D. Mont.) in an action brought against the State of Montana seeking to determine title to the bed of the Big Horn River within the exterior boundaries of the Crow Indian Reservation and to resolve certain

** Hon. David W. Williams, United States District Judge for the Central District of California, sitting by designation.

questions regarding the authority to regulate the hunting and fishing activities of non-Indians and others not members of the Crow Tribe within the exterior boundaries of the reservation. We note jurisdiction under 28 U.S.C. § 1291, and reverse.

FACTS

The Crow Indian Reservation is the remnant of a much larger tract of land recognized as Crow lands by the United States in the Treaty of Fort Laramie of 1851, 11 Stat. 749. In 1868, this original reservation was diminished from one of 38,531,174 acres to one of approximately 8,000,000 acres by the Second Treaty of Fort Laramie, 15 Stat. 649. Subsequent Congressional Acts have reduced the size of the reservation even further to its present acreage of approximately 2,282,764 acres.[1] The Big Horn River is a navigable watercourse that flows through the heart of the reservation from south to north.

The Treaties of 1851 and 1868 contain only two explicit references to hunting and fishing rights. Article 5 of the Treaty of 1851 states that the eight Indian nations signatory to the treaty "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." Article 4 of the Treaty of 1868 provides that the Indians "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Notwithstanding these scant references to the Crow Tribe's hunting and fishing rights, Article 2 of the Treaty of 1868 specifically

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[1] *See* 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937). *See also* the maps reproduced in *United States v. Finch*, 395 F. Supp. 205, 215 20 (D. Mont. 1975).

describes the reservation as that place "set apart for the absolute and undisturbed use and occupation of the Indians."

Originally, all land within the reservation was held by the United States in trust for the Crow Tribe. No land could be transferred to non-Indians. The Allotment Acts of 1887 and 1920,[2] however, provided that patents in fee could be issued by the United States to individual Indian allottees. Once these patents were issued, the allottees could convey their land to non-Indians. At present, approximately 30% of the land within the reservation is owned in fee. The great majority of the remainder is owned by the United States in trust either for individual Indians or for the Crow Tribe.[3]

In 1973, the Crow Tribal Council passed Resoultion 74-05 which prohibits hunting and fishing within the reservation by everyone other than members of the Crow Tribe.[4] The State of Montana,

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[2] 24 Stat. 388; 41 Stat. 751.

[3] Of the 2,282,764 acres of reservation land that remains, the ownership can be broken down as follows:

Type of Ownership	Acreage	Percentage of Ownership to Total Acreage
Allotted	1,187,592.34	52.02%
Tribal (Surveyed)	379,740.64	16.64%
Tribal (Unsurveyed)	15,850.85	.69%
Government Owned	1,400.50	.07%
Yellowtail Dam	6,695.64	.29%
State Lands	44,804.82	1.96%
Fee Lands	646,679.12	28.33%
TOTAL:	2,282,764.00	100.00%

United States v. Montana, 457 F. Supp. 599, 602 (D. Mont. 1978).

[4] Resoultion 74—5 states in part:
Be it ordained by the Crow Tribe, meeting in a duly held and noticed

however, as it has done in the past, continues to authorize hunting and fishing within the reservation by announcing the opening and closing of hunting seasons to all lands within the reservation and by issuing hunting and fishing licenses which purport to allow those not members of the Crow Tribe to hunt and fish within the reservation. This conflict between the State of Montana and the Crow Tribe concerning hunting and fishing within the reservation has resulted in this present action.[5]

In the court below, appellants sought a judgment declaring that: (1) The United States holds title to the bed and banks of the Big Horn River within the exterior boundaries of the Crow Indian Reservation in trust for the Crow Tribe; (2) The Crow Tribe has authority to prohibit hunting and fishing within the reservation by those not members of the Crow Tribe; and (3) The State of Montana has no authority to regulate hunting and fishing within the exterior boundaries of the reservation. The district court held that: (1) The title to the bed and banks of the Big Horn River to the high water mark is held by the State of Montana; (2) The State of Montana has ex-

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council that hunting, fishing and trespassing within the exterior boundaries of the Crow Indian Reservation is hereby prohibited and the proper officials of the United States and the Crow Tribe of Indians are hereby directly and authorized to enforce the provisions of this ordinance and any federal statute which would prohibit such hunting and fishing and trespassing, provided, however, that the provisions of this ordinance shall not apply to the members of the Crow Tribe of Indians.

Be it further resolved, that the Crow Tribal officials inform the State Fish and Game Department for the State of Montana and Bureau of Indian Affairs (United States Department of Interior) that hunting and fishing on the Crow Reservation is hereby closed.

[5] Because the Crow Tribe itself was a party bringing this action, this case therefore is clearly distinguishable from *California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979). In that case we held barred by sovereign immunity a suit brought by California *against* a tribe.

clusive jurisdiction to regulate non-Indian hunting and fishing activities on the Big Horn River and all patented land owned by non-Indians within the exterior boundaries of the Crow Indian Reservation; (3) The State of Montana has concurrent jurisdiction with the United States to regulate non-Indian hunting and fishing activities on tribal or Indian lands if such activities are in violation of state law; (4) The Crow Tribe's exclusive rights of hunting and fishing within the reservation are limited to those lands set forth in 18 U.S.C. § 1165; and (5) The Crow Tribe has no authority to regulate non-Indian hunting and fishing activities within the exterior boundaries of the reservation, save in granting permission to non-Indians to trespass on tribal or Indian lands for the purpose of hunting and fishing. *United States v. Montana*, 457 F. Supp. 599, 611 (D. Mont. 1978).

We reserve and remand to the district court with instructions to enter a judgment consistent with the holdings of this opinion. Our holdings are as follows:

[1] (1) That the title to the bed and banks of the Big Horn River to the ordinary high water mark situated within the exterior boundaries of the Crow Indian Reservation is held in trust by the United States for the use and benefit of the Crow Tribe of Indians.

[2] (2) That Resolution 74-05 adopted by the Crow Tribe, meeting in a duly held and noticed council, is a valid exercise of tribal power except insofar as it attempts to proscribe all hunting and fishing by those not members of the Crow Tribe (whether Indians or non-Indians) on fee patent lands on which such non-members reside.

[3] (3) That the Crow Tribe has the power to regulate hunting and fishing within the exterior boundaries of the Crow Indian Reservation by non-

members of the Crow Tribe (whether Indian or non-Indian) subject to the following limitations:

(a) That the Crow Tribe lacks the power to impose criminal sanctions on non-Indians who violate its hunting and fishing regulations,

(b) That the exercise by the Crow Tribe of its power to regulate hunting and fishing by non-Indians must be within the constraints recognized by this court in *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976),

(c) That the regulation of hunting and fishing by non-members of the Crow Tribe (whether Indians or non-Indians) who reside on fee patent lands within the reservation, whether such hunting and fishing is done on such lands or elsewhere within the reservation, must be reasonable and consistent with sound principles of conservation.

[4] (4) That the State of Montana also has the power to regulate hunting and fishing within the exterior boundaries of the Crow Reservation by non-members of the Crow Tribe (whether Indians or non-Indian) subject to the following limitations:

(a) That such regulations of the State of Montana not regulate indirectly the hunting and fishing by members of the Crow Tribe.

(b) That such regulations of the State of Montana must have as their purpose the conservation and proper management of game and fish and not to discriminate against, nor to impede authorized regulations, by the Crow Tribe.

The authorities and reasons supporting these holdings are set forth in the balance of this opinion.

I.

BED AND BANKS OF BIG HORN.

We have previously considered the status of the title to the bed and banks of the Big Horn River within the exterior boundaries of the Crow Reservation. *United States v. Finch,* 548 F.2d 822 (9th Cir. 1976), *vacated,* 433 U. S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977).[6] We held that to the ordinary high water mark the title to the bed and banks of the Big Horn is held by the United States in trust for the Crow Tribe. Although our judgment was vacated by the Supreme Court on grounds not related to the issue of title, we regard our holding in *Finch* as the applicable authority in this circuit. While recognizing that the issue is a close one, we again hold, as did *Finch,* that within the exterior boundaries of the reservation, the United States, not the State of Montana, holds the title and that that title is held in trust for the Crow Tribe.

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[6] *United States v. Finch,* 548 F2d 822 (9th Cir. 1977), involved a criminal prosecution under 18 U.S.C. § 1165, which makes punishable the unauthorized entry upon Indian lands for the purpose of hunting fishing or trapping. While standing on the bank of the Big Horn River within the Crow Indian Reservation, the defendant had cast a fishing lure into its waters. He was subsequently charged with violating section 1165. The district court dismissed the information on the ground that Montana owned the bed of the Big Horn River and that, therefore, there had been no unauthorized entry upon Indian lands. We reversed, holding that the United States, by signing the Treaty of 1868, granted the Crow Tribe dominion and control over that portion of the bed of the Big Horn River situated within the reservation and that the defendant had therefore made an entry upon Indian land. *United States v. Finch, supra,* 548 F.2d at 831. Although the Supreme Court vacated our decision on double jeopardy grounds, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed2d 1048 (1977), our analysis of the title issue was in no way questioned.

II.
VALIDITY OF TRIBAL REGUALTION 74-05

The power of the Crow Tribe to exclude those not members of the tribe from hunting and fishing within the exterior boundaries of the reservation has its source in the treaties of 1851 and 1868. As already indicated, Article 5 of the Treaty of 1851 recognized that none of the Indians whose tribes were parties to the treaty surrendered "the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." It was recognized in *Crow Tribe of Indians v. United States,* 284 F.2d 361, 151 Ct.Cl. 281 (1960), *cert. denied,* 366 U.S. 924, 81 S.Ct. 1350, 6 L.Ed.2d 383 (1960) that this provision permitted entry by members of each of the signatory tribes on the territory as described in the treaty of each other signatory tribe for the purpose of hunting and fishing. At the same time, the Treaty of 1851 recognized the title of the Crow Tribe to the lands described therein as belonging to it. *Crow Tribe of Indians v. United States, supra.*

This recognition was confirmed by the circumstances surrounding the execution, as well as the language, of the Treaty of 1868. In *United States v. Finch,* supra, 548 F.2d at 830-31, we pointed out that the purpose of the 1868 treaty was to reduce the size of territory designated by the Treaty of 1851 as belonging to the Crow. We also pointed out that the 1868 treaty contained an explicit agreement by the United States that the reduced territory would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them. . ." Fur-

thermore, the 1868 treaty stated:

> [T]he United States now solemnly agrees that no person, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian Reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . .

Art. 2, 15 Stat. 649.

By acquiring from the Crows a very substantial part of the territory set apart for them, by the 1851 treaty the United States "intended that all lands therein [the reduced territory], including the riverbed, were to be for the exclusive use of the tribe." *United States v. Finch, supra,* 548 F.2d at 831. However, the 1868 treaty in Article 4 accorded the Indians a qualified right to hunt on the land acquired from the Crows by the United States. The Article provides that the Indians "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts."

It must be admitted that the two treaties do not establish irrefutably the validity of Tribal Regulation 74-05. At the time of the treaties the Crows were primarily hunters of buffalo and elk and their hunting parties did not always remain within their treaty-designated territory, a fact the Treaty of 1868 explicitly recognized. Nor was their treaty-designated territory an area within which only they, but not others, hunted. Immigrants destined for Oregon and California as well as other Indians undoubtedly hunted and fished within this territory.

Big game stocks, however, were being depleted, a fact that caused anxiety among the Crows and official concern on the part of the United States. In *Finch*, we construed the Treaty of 1868 to reflect this official concern and to "set aside lands which would provide the tribe with the food and natural resources upon which their livelihood depended." We declined to interpret the Treaty to deprive the Crows of "potential control over [any] source of food on their reservation." 548 F.2d at 832. This Treaty, augmented by 18 U.S.C. § 1165, which makes going on Indian land to hunt or fish without permission a criminal offense, led us in *Finch* to hold that "the right of Indians to control hunting, trapping and fishing on their lands is a prerogative of ownership which the United States recognizes as a matter of federal law." 548 F.2d at 834. We do not retreat from that holding.[7]

We must, however, here confront an issue that was absent in *Finch*. It is the extent to which the Crows can prohibit hunting and fishing within the reservation by those who, while not members of the tribe, reside on fee patent lands within the reservation. Tribal Regulation 74-05 entirely proscribes hunting and fishing by *all*, except those who are members of the Crow Tribe. By attempting to preclude *all* hunting and fishing by non-members of the Crow Tribe who reside on fee patent land within the reservation we believe the Crow Tribe exceeded its power under the treaties as augmented by 18 U.S.C. § 1165.

We take this position in full awareness that im-

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[7] Of course, to the extent that Crow Tribal Resolution 75—17b purports to allow the Crow Tribe to exercise criminal jurisdiction over non-Indians in order to enforce 74—05, it is invalid under the holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed2d 209 (1978).

pairment or modification of a treaty right is not lightly to be imputed to Congress. *See, Menominee Tribe of Indians v. United States,* 391 U. S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). Nonetheless, it is a fact that subsequent to the 1851 and 1868 treaties Congress enacted the General Allotment Act of 1887[8] and the Crow Allotment Act of 1920,[9] one of the recognized consequences of which was the occupation in time of fee patent lands by non-Indians and perhaps other Indians not members of the Crow Tribe. Substantial assimilation was a goal of these Acts. [10] While neither of these Acts, nor any other to which our attention has been called,[11] explicitly qualifies the Tribe's rights over hunting and fishing, it defies reason to suppose that Congress intended that non-members who reside on fee patent lands could hunt and fish thereon only by consent of the Tribe. So far as the record of this case reveals, no efforts to exclude completely non-members of the Crow

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[8] 24 Stat. 388, 25 U.S.C. § 331 et seq.

[9] 41 Stat. 751.

[10] 59 Cong.Rec. 6000 (1920) (remarks of Rep. Riddick quoting Frank Yarlott, tribal representative):

As the bill now stands, it has the unqualified endorsement of the entire tribe. To the educated Indians who have closely watched events this seems the best solution to the long vexed "Indian problem." This means the gradual influx of white settlers, with whom the Indians will become acquainted and gradually absorb their methods of farming and cattle raising. They will come to understand the white temperament gradually and be friends.

[11] *See* Act of April 11, 1882, 22 Stat. 42; Act of July 10, 1882, 22 Stat. 157; General Allotment Act, Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. § 331 et seq.; Act of March 3, 1887, '24 Stat. 545; Act of February 12, 1889, 25 Stat. 660; Act of March 1, 1893, 27 Stat. 529; Act of April 27, 1904, 33 Stat. 352; Act of June 4, 1920, 41 Stat. 751; Act of May 26, 1926, 44 Stat. 658;Acts of April 15 and July 3, 1930, 46 Stat. 168 and 860, 876; Act of July 15, 1958, 72 Stat. 361. Section 2(d) of this last Act specifically confirms the right of members of the Crow Tribe to fish without state regulation on those parts of the reservation taken for Yellowtail Dam and Reservoir.

Tribe from hunting and fishing within the reservation were being made by the Crow Tribe at the time of enactment of the Allotment Acts.[11A] Game had grown scarce and the agrarian life in a substantially assimilated society appeared to offer the Crows the means of survival.[12] Undoubtedly the desire for land by non-Indians constituted an additional force behind the passage of the Allotment Acts. The presence of this force in no way weakens, indeed, it

[11A] Exhibits covering the years 1912 to 1923, a time bracketing the periods of the 1920 Allotment Act, demonstrate a concern with non-Indian hunters on the Crow Reservation. (Pl.Exs. 5—27.) At that time a federal statute prohibited non-Indian hunting in Indian country except for subsistence purposes. (Pl.Ex. 22). The concern focuses predominantly upon "hunting parties on the reservation which had become so frequent as to reduce the wild game materially, and in some cases interfered with the grazing of live stock on the reservation." (Pl.Ex. 10.) These exhibits demonstrate concern not only for overhunting by non-Indians, but also bad hunting practices by Indians themselves, indicating that even they should be subject to state hunting regulations. (Pl.Ex. 23.)

The end product of this concern is a set of regulations enacted by the Crow Tribe forbidding fishing or hunting on the reservation except upon a permit issued by the superintendent of the reservation. Hunting of larger game, the numbers of which had been badly depleted, was not to be permitted at all. (Pl.Ex. 25.) The fees called for and references to the revenue derived therefrom indicate that the regulation may have had a not insignificant money raising purpose. (pl.Exs. 25 & 26.) Moreover, the regulation clearly foresaw a close interrelationship between the reservation-issued permits and state regulation. Limits and seasons of the state regulation applied to all permittees.

These exhibits also distinguish, albeit not in a precise manner, between non-resident non-Indians and resident non-Indians. Thus the allowance of "subsistence" hunting and fishing recognizes the rights of resident non-Indians to gather food and game necessary to life. Interior Department correspondence recognizes the difficulty in not permitting bona fide residents of the reservation to hunt (Pl.Ex. 9.) Some correspondence notes that the existing practice was to prohibit hunting and fishing by "outsiders." (Pl.Exs. 15, 17 & 18.) The Department of the Interior also recognized the difficulty of preventing fishing along streams with considerable patent land, seemingly recognizing that the holders of that land might fish if they so chose. (Pl.Ex. 22.) It appears on this record that no serious effort to completely forbid hunting and fishing by all non-Indians on reservation lands was made.

[12] See note 10, *supra*.

only strengthens, our belief that Congress did not intend to make the fee patent land occupier's bagging of game from his front step subject to permission of the Crow Tribal Council.

We must recognize that in this case, as in others in which we are required to fix the rights and powers of Indians in the latter part of the twentieth century in the light of treaties of an earlier century, our task is to keep faith with the Indian while effectively acknowledging that Indians and non-Indians alike are members of one Nation. Both seek power and gain through identical processes, *viz.* commerce, politics, and litigation. We must, however, live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians.

In this spirit we hold that, as to those not members of the Crow Tribe who reside on fee patent lands within the reservation, Tribal Regulation 74-05 is invalid insofar as it attempts to proscribe all hunting and fishing on the lands on which such non-members reside.[13] Two aspects of our holding require emphasis. The first is that the proscription is lifted only with respect to non-members who reside on fee patent lands within the reservation. Such resident non-members may be owners of fee patent lands or those whose occupancy is authorized by an owner as, for example, tenants or employees. Non-resident non-member owners remain subject to the exclusion. The second is that non-member residents enjoy freedom from the absolute proscription only with respect to hunting and fishing on tracts on which they reside. With respect to all other territory within the reser-

[13] The extent to which the Crow Tribe may *regulate* hunting and fishing by resident non-members is discussed in Part III, *infra*.

vation they are subject to the regulation's bar. In this manner we believe the regulation is accorded a scope that keeps faith with the Crows while avoiding a construction that could only foster confrontations of an unpredictable character.

The distinction between non-member residents and non-resident non-member owners rests on the proposition that modifications of Indian treaty rights should be narrowly construed. Our modification with respect to non-member residents recognizes that those who "live on the land" in the West are likely to regard hunting and fishing thereon to be as natural and ordinary as working, sleeping, and eating.[13A] Those who do not "live on the land" are somewhat less inclined. We, therefore, group all non-resident non-members together even though some in fact may own fee patent land within the reservation.

III.

POWER OF CROW TRIBE AND THE STATE OF MONTANA TO REGULATE HUNTING AND FISHING BY THOSE NOT MEMBERS OF THE TRIBE WITHIN THE CROW RESERVATION.

The power to exclude those not members of the Crow Tribe from hunting and fishing within the exterior boundaries of the Crow Reservation that Tribal Regulation 74-05 asserts, the validity of which we have substantially upheld, does not perforce embrace the exclusive power to regulate hunting and fishing by non-members within the reservation. The

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[13A] Evidence that federal officials recognized to some degree this residential right to pursue game is found in exhibits noting problems with non-Indian hunters impinging on Indian lands but allowing "subsistance" hunting and possibly even recognizing the right of owners to fish on patent land within reservations. See note 11A, *supra*.

private owners of land may exclude the public from hunting and fishing thereon; his admission of the public, however, does not clothe him with all the raiment of sovereignty.

The Crow Tribe with respect to its reservation is, of course, more than merely a private owner. The Tribe possesses "attributes of sovereignty over both their members and their territory. . . ." *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed2d 303 (1978). These "attributes spring from "*inherent powers of limited sovereignty which [have] never been extinguished.*" 435 U.S. at 322, 98 S.Ct. at 1086 (quoting F. Cohen, Hanbook of Federal Indian Law, 122 (1945) (emphasis in original). On the other hand, the sovereignty of the Crow Tribe is *limited.* "It exists only at the sufferance of Congress and is subject to complete defeasance." 435 U.S. at 323, 98 S.Ct. at 1086. It does not embrace, for example, criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). Moreover, the Court in *Oliphant* observed:

> "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . .exist in subordination to one or the other of these two." *United States v. Kagama,* 118 U.S. 375, 379, 6 S.Ct.1109, 1111, 30 L.Ed. 228 (1886). 435 U. S. at 211, 98 S.Ct. at 1022.

This court on two occasions has spoken specifically about the power of Indian tribes to regulate hunting and fishing within their reservations. In *Quechan*

Tribe of Indians v. Rowe, 531, F2d 408 (9th Cir. 1976), after recognizing the power to control hunting and fishing on its reservation, we delineated its powers in the following manner.

> Given those powers, the Quechan Tribe may exercise several types of authority over non-members who enter the reservation to hunt or fish. These are the right to determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; to expel those who enter the reservation without proper authority or those who violate tribal, state or federal laws; to refer those who violate state or federal laws to state or federal officials; and to designate officials responsible for effectuating the foregoing.

531 F.2d at 411.

Also, after denying that the Quechan Tribe had authority to assert criminal jurisdiction over non-members who violate tribal law while on the reservation, we further held the Tribal could not cause a forfeiture of a non-member's weapons or other property as a consequence of violating tribal law.

The second occasion was in *United States v. Sanford,* 547 F.2d 1085 (9th Cir. 1976), a case pertaining to hunting by non-members of the Crow Tribe on the Crow Reservation. We held that on the basis of the record before us Montana game laws were applicable to hunting and fishing by non-members on the Crow Reservation. We accepted as correct the following statement made by the Supreme Court of Montana in *State v. Danielson,* 149 Mont. 438, 4276 P.2d 689, 692-93 (1967):

> [T]he State of Montana has jurisdiction to enforce its fish and game regulations on Indian reservations contained within its boundaries with respect to

persons who are not tribal Indians unless precluded from doing so by an act of Congress or unless such enforcement would interfere with self-government on the reservation.

Our task is to adjust the powers of the Crow Tribe and the State of Montana in a manner consistent with these authorities. We lack the power to alter them even if we wished to do so. We approach this task convinced that the preservation and improvement of the stocks of fish and game within the State of Montana, as well as the Crow Reservation, requires the cooperation of the United States, the State of Montana, and the Crow Tribe. The nature of this cooperation cannot be fixed by reference to the contributions made in the past by each of the three to fish and game conservation. Rather it must rest on the above authorities and be shaped by the best judgment of which we and all parties to this lawsuit are capable.

So guided, our holdings, as previously indicated, are as follows. The Crow Tribe, to the extent it permits hunting and fishing within the exterior limits of its reservation by non-members, must regulate such hunting and fishing in the manner prescribed in *Quechan Tribe of Indians v. Rowe.* That is, the Tribe may fix the seasons and limits with respect to each species of game or fish applicable to non-member hunting and fishing as it sees fit. Enforcement of these regulations, however, must be accomplished without subjecting non-Indians to the criminal jurisdiction of the tribal courts.[14] Forfeiture of the arms or other property of non-Indians under *Quechan* constitutes an impermissible criminal san-

[14] We express no opinion with respect to whether non-member Indians are subject to the criminal jurisdiction of the Crow tribal courts.

ction. All other actions by tribal officials sanctioned by *Quechan* are available to aid the Tribe in enforcing its regulations. Fees, for example, may be imposed on non-members by the Tribe for the privilege of hunting and fishing on the Crow Reservation.

The State of Montana, as *Sanford* teaches, also retains the power to regulate hunting and fishing by those not members of the Crow Tribe within the limits of the Crow Reservation. While the State of Montana cannot require the Crows to admit non-members into the reservation for the purpose of hunting and fishing, non-members who do obtain such permission remain subject to Montana's fish and game laws while so hunting and fishing and, of course, are subject to tribal regulations as well. Thus, a non-member so hunting or fishing must obtain a proper license from the State of Montana as well as from the Crow Tribe. Fish and game limits imposed by the State remain applicable to non-members. Violators are subject to such civil and criminal penalties as the State imposes.

Dual regulation of hunting and fishing on Indian reservations is not unknown. *See Confederated Tribes of the Colville Indian Reservation v. Washington*, 591 F.2d 89 (9th Cir. 1979). In *Confederated Tribes* we described the role of the State of Washington under the structure of dual regulation. We there recognized as follows:

> The only authority claimed by the State is to impose upon non-Indians who wish to fish upon the reservation its licensing requirements and such of its statues and regulations as impose restrictions equal to or more restrictive than those that the Tribes apply to both Indians and non-Indians who fish on the reservation. The State does not claim that it can authorize fishing or fishing prac-

tices by non-Indians on the reservation that are prohibited by the Tribes' regulations.

591 F.2d at 92.

This substantially describes the State of Montana's effective role with respect to hunting and fishing by non-members on the Crow Reservation. As to such hunting and fishing the more severe restrictions, whether originating with the State or the Tribe, control.[15]

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[15] In *United States v. Sanford, supora*, 547 F.2d 1085, we held that Montana's game laws applied to the activities of non-Indians on Indian reservations. We predicated this holding on our conviction that "the application of Montana game laws to the activities of non-Indians on Indian reservations does not interfere with tribal self-government on reservations." 547 F.2d at 1089. In *Sanford*, however, we were not confronted with conflicting tribal and state regulations.

When both state and tribal fish and game regulations further the goal of maximizing the utility of fish and game resources, and when the state's regulations are more restrictive than the tribe's, a non-Indian who violates the state regulation on the reservation is subject to state law. Such exercise of jurisdiction by the state does not infringe upon the tribe's right to self-governemnt.

The decision in *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F.2d 75 (4th Cir. 1978), is distinguishable. There, the circuit court held that North Carolina could not enforce its fishing licensing laws with respect to non-Indians fishing for trout in streams on the Band's reservation because such enforcement would violate the standard established in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), which stated that: "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.s. at 220, 79 S.Ct. at 271. In the *North Carolina Wildlife Resources* case, the state imposed a license fee of $5.50, but the Band had a fee of only $2.00 and did not require non-members to have a state license in order to fish on the reservation. The court stated:

The strong federal policy supporting the Band 's fishing program and the significant federal efforts sustaining it demonstrate an intention to preclude state regulation of non-member fishing on the Band's reservation.

[The license requirement] also frustrates and impedes one major goal of tribal self-government, financial self-sufficiency . . .[It] would impair the Band's attempts to manage its own affairs by curbing its revenues and reducing the receipts of many of its members doing business with tourists. 588 F.2d at 78.

We recognize that dual regulation of non-member hunting and fishing requires cooperation between the State's enforcement, personnel and that of the Tribe. We believe that this will be forthcoming. Obviously the United States can and should contribute significantly in bringing about this cooperation. It is equally obvious that the State of Montana must promulgate and enforce its regulations in a manner that does not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *See Williams v. Lee,* 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959). This means, *inter alia,* that Montana can neither regulate, directly nor indirectly, hunting and fishing by members of the Crow Tribe nor fashion its regulations of non-member hunting and fishing so as to discriminate against the Crow Tribe rather than to conserve the game and fish.

Our recognition of dual regulation of non-member hunting and fishing indicates that, as in *Confederated Tribes,* we find no "clear manifestation" of a congressional intent to preempt state regulation entirely. Nor would the adoption by the Crow Tribe of comprehensive regulations governing non-member hunting and fishing within the reservation "clearly manifest" such an intent. The Crow Tribe is neither the United States nor its Council the Congress thereof.

Regulation by the Crow Tribe of hunting and fishing by non-members who reside on fee patent lands located within the reservation requires special attention. As we held above, the Crow Tribe lacks the power to proscribe all hunting and fishing on fee

Central to the court's decision was its conclusion that North Carolina had "no possible interest . . . in this purely commercial undertaking." 588 F.2d at 79. In our case, however, Montana has a great interest in protecting the migratory game which pass over reservation lands.

patent lands by non-members who reside thereon. We now hold, however, that Congress did not intend by the applicable allotment acts to deprive the Tribe of all power to regulate such hunting and fishing. Regulation of hunting and fishing by non-members who reside on fee patent lands within the reservation, whether done on such lands or elsewhere within the reservation, must be reasonable, non-discriminatory, and consistent with sound principles of conservation. Within these limits such hunting and fishing may be regulated by the Crow Tribe.

IV.
A POSTSCRIPT

Our holdings reflect a degree of precision not always present in the sources on which we must rely. We recognize this. Our justification is that the problems this case presents are serious and require resolutions whose outlines are reasonably sharp and clear. While the judiciary is frequently not the institution of government best suited to frame such resolutions, its ability to intervene upon being invoked by the plaintiff in a lawsuit enables it to provide provisional relief when it is perceived that legislative or executive solutions are unlikely to be offered within the reasonable foreseeable future. This is precisely the situation we believe we confront in this case as well as in many other cases involving those responsibilities and necessities which this Nation confronts in dealing with Indians. Should we err in this belief, the events that demonstrate our error will also remove its harmful consequences. We, therefore, in this spirit reverse the judgment of the district court and remand this case to that court to enter a judgment that reflects our holdings.

REVERSED and REMANDED

OPINION ON PETITION FOR REHEARING

PER CURIAM:

Subsequent to the date our opinion was filed the Supreme Court rendered its decision in *Wilson v. Omaha Indian Tribe,* 47 U.S.L.W. 4758 (June 20, 1979.) The State of Montana in its petition for rehearing argued that *Wilson* required that Montana law be applied to determine the upper limit of the title to the bed and banks of the Big Horn. So applied, the State of Montana pointed out, would require that this limit be the low-water mark rather than the ordinary high water mark that we held was proper. In response to Montana's petition, the United States argued that federal common law determined the proper upper limit of the Big Horn bed and banks and that such common law should not borrow state law as its law as was done in *Wilson.* Under federal common law both the State of Montana and the United States agree that the bed and banks of the Big Horn would reach to the ordinary high water mark.

We confess to a certain amount of difficulty in determining the proper response to the State of Montana's argument. Under *Wilson* the adoption of state law as a part of federal common law requires considering

> . . . whether there is need for a nationally uniform body of law to apply in situations comparable to this, whether application of state law would frustrate federal policy or functions, and the impact a federal rule might have on existing relationships under state law.

We have considered these factors and have concluded, albeit less confidently than we would like, that state law should not be adopted as the federal

common law in this case.

Our consideration of whether a nationally uniform law is needed yields uncertainty. The United States argues that a nationally uniform rule is needed because of the vast amount of lands held in trust for Indians that it administers. We are not entirely convinced that these responsibilities necessitate rejection of *Wilson's* adoption of state law.

Such rejection, however, very well may prevent frustration of "federal policy and functions." We reach this conclusion because of the particular history of the allotments of riparian land on the Crow Reservation. Almost all such land, the United States asserts and the State of Montana does not deny, was initially allotted to Indians who, in some instances, later sold to non-Indians. Under these circumstances, it is natural to assume, the United States argues, that federal common law alone should fix the boundary between the bed and bank of the Big Horn River, which was held in trust for the Crow Tribe, and riparian land originally alloted to individual Indians. This argument has force.

> Many years ago this court observed:
>
> The general rule, of course, is that patents of the United States to lands bordering navigable waters, in the absence of special circumstances, convey only to high water mark.

Montana Power Co. v. Rochester, 127 F.2d 189 (9th Cir. 1942). We know of no reason why that principle was not applicable to the patents of the riparian land involved in this case. To adopt at this late date a different rule very likely would frustrate the intention of the United States in granting the patents. This can be described, we think, as frustration of "federal policy and functions."

Finally, we are not convinced that failing to adopt Montana law as federal common law will impact harmfully on existing relationships under state law. It is true it may have been thought by some riparians that the State of Montana owned the bed and banks of the Big Horn and that Montana law fixed the limits of riparian title. When the assumption regarding the title to the Big Horn is removed, however, there is much less reason to expect that state law will fix those limits. In any event, to assume that the State of Montana owned the bed and banks of the Big Horn was to assume something not then established by law.

On balance, therefore, we decline to alter the view we expressed in our original opinion, *viz.*, that title to the bed and banks of the Big Horn extends to the ordinary high water mark.

APPENDIX B

The UNITED STATES OF AMERICA, in its own right and as fiduciary on behalf of the Crow Tribe of Indians and the Crow Tribe of Indians, as interventors.

Plaintiffs

v.

The STATE OF MONTANA, Montana State Fish and Game Commission, WILLIS B. JONES, ARNOLD RIEDER, ARTHUR C. HAGENSTON, JOSEPH J. KLABUNDE, W. LESLIE PENGELLY, WESLEY R. WOODGERD, AND BIG HORN ROD and GUN CLUB and CITIZENS' RIGHTS ORGANIZATION, as intervenors,

Defendants

The STATE OF MONTANA, Montana State Fish and Game Commission, WILLIS B. JONES, ARNOLD RIEDER, ARTHUR C. HAGENSTON, JOSEPH J. KLABUNDE, W. LESLIE PENGELLY, and WESLEY R. WOODGERD, on behalf of themselves and on behalf of the citizens of the State of Montana and of the United States of America and the public and as representatives of all non-Crow Indian owners of real property within the Crow Indian Reservation, and Big Horn Rod and Gun Club and Citizens' Rights Organization, as intervenors,

Cross-Claimants

v.

The UNITED STATES OF AMERICA, in its own right and as fiduciary of the Crow Tribe of Indians, and the Crow Tribe of Indians,

Cross-Defendants

No. CV-75-105-BLG.
United States District Court,
D. Montana,
Billings, Division.
July 31, 1978.

The United States, in its own right and as fiduciary on behalf of the Crow Tribe of Indians sought to quiet title to the bed and banks of the Big Horn River. The District Court, Battin, J., held that: (1) the State of Montana owned the bed and banks of the Big Horn River and the same are not held in trust by the United States for the use and benefit of the Crow Tribe; (2) the State of Montana has authority to regulate hunting and fishing by non-Indians on the Crow Indian Reservation, and (3) Montana's regulation of hunting and fishing by non-Indian persons within the exterior boundaries of the Crow Indian Reservation was within its power and authority.

Declaratory judgment entered.

Steven E. Carroll, Dept. of Justice, Washington, D.C., for The United States.

Thomas J. Lynaugh, Thomas K. Schoppert, Lynaugh, Fitzgerald, Schoppert, Skaggs & Essman, Billings, Mont., R. Anthony Rogers, Charles A. Hobbs, Wilkinson, Cragun & Barker, Washington, D.C. for Crow Tribe of Indians.

Michael Greely, Atty. Gen., Helena Mont., Urban L. Roth, Sp. Asst. Atty. Gen., Butte, Mont., for the State of Montana.

Clayton R. Herron, Sp. Asst. Atty. Gen., Helena, Mont., for Fish and Game Commission.

Bert W. Kronmiller, James E. Seykora, Hardin, Mont., for Big Horn Rod and Gun Club.

Douglas Y. Freeman, Hardin, Mont., for Citizens'

Rights Organization.

OPINION

BATTIN, District Judge.

This case seeks to quiet title to the bed and banks of the Big Horn River. A corollary issue requires a determination of whether the State of Montana has the authority to regulate hunting and fishing within the exterior boundaries of the Crow Indian Reservation by non-Indian persons, since the Crow Tribe purportedly has an exclusive treaty right to reservation hunting and fishing. The final issue is whether the State of Montana, acting through the auspices of the State Fish and Game Department, is lawfully asserting authority to regulate hunting and fishing by non-Indian persons within the exterior boundaries of the Crow Indian Reservation.

The case was tried before the Court, sitting without a jury, on June 27, 1978. An extensive and laudatory record has been made. The Court, having considered the evidence adduced at trial, the testimony of the witnesses, and the exhaustive legal arguments presented by counsel for each of the parties, finds as follows:

(1) That the State of Montana owns the bed and banks of the Big Horn River and that the same are not held in trust by the United States of America for the use and benefits of the Crow Tribe of Indians. *United States v. Finch*, D.C., 395 F.Supp. 205 (1975);[1]

[1] *United States v. Finch*, D.C., 395 F. Supp. 205 (1975), wherein this Court declared that the Big Horn River belonged to the State of Montana, was subsequently reversed by the Ninth Circuit Court of Appeals. *United States v. Finch*, 548 F.2d 822 (9th Cir. 1972) sic (1976). However, the Ninth Circuit decision was thereafter vacated by the United States Supreme Court when that Court granted *certiorari*, reversed the Circuit Court decision on other grounds, and directed the Circuit to dismiss the appeal. 433 U. S. 676, 97 S.Ct. 2909, 53 L.Ed.2d

(2) The State of Montana has authority to regulate hunting and fishing, by non-Indians on the Crow Indian Reservation, and Montana's fish and game laws apply to such persons. *United States v. Sanford*, 547 F.2d 1089 (9th Cir. 1976);[2] and

(3) The State of Montana is properly acting within its power and authority in regulating hunting and fishing by non-Indian persons within the exterior boundaries of the Crow Indian Reservation.

I. JURISDICTION

Subject matter jurisdiction over this cause exists in the District Court by virtue of 28 U.S.C. §§ 1345 and 1362. Venue is proper, as all the defendants reside within the District. A case or controversy exists between each of the plaintiffs and each of the defendants as to the title to the bed and banks of the Big Horn River to the high water mark and as to which governmental entity has authority to regulate hunting and fishing within the exterior boundaries of the Reservation. The plaintiffs have no adequate remedy at law and are entitled to bring this action for declaratory relief.

1048. This Court does not feel bound by the Circuit's determinations in the *Finch* case, *supra*. The Circuit's decision in *United States v. Finch*, *supra*, may be an indication of how that Court would rule if there were an appeal in this case. However, I am confident that the Court of Appeals will find, on the record made here, that the bases for its earlier decision are not supported by the record.

[2] *United States v. Sanford*, 547 F.2d 1085 (9th Cir. 1976), is particularly appropriate to this issue, as the case involved the same Indian reservation. The Circuit adopted the reasoning of the Montana Supreme Court with respect to the regulation of hunting and fishing by non-Indians on the Crow Indian Reservation, and adopted the state court's reasoning in interpreting 18 U.S.C. § 1165. *See, State v. Danielson*, 149 Mont. 438, 427 P.2d 689 (1967). *Accord, The White Mountain Apache Tribe v. The State of Arizona, Dept. of Fish and Game, et al.* (No. Civ. 77—867, PHX WPC, June 13, 1978).

II. FACTS

The history and negotiations of the treaties which are considered in this action were discussed in detail by the Court of Claims in the case of the *Crow Tribe of Indians v. United States,* 284 F.2d 361, 151 Ct.Cl. 281 (1960); *Crow Nation v. United States,* 81 Ct.Cl. 238 (1935); and *Fort Berthold Tribe of Indians v. United States,* 71 Ct. Cl. 308 (1930). Thus, it is unnecessary to elaborately discuss the treaty background and the history need not exhaustively be repeated here. It is necessary as a preliminary matter to extract from the record the factual basis upon which the Court has determined the ownership of the bed and banks of the Big Horn River.

The present Crow Indian Reservation is part of a large tract recognized as Crow lands by the Treaty of Fort Laramie of 1851, 11 Stat. 749, 2 C. Kappler, *Indian Affairs: Laws and Treaties* 594 (hereinafter cited as "Kapp."). The treaty with the Crows of 1868, 15 Stat. 649, 2 Kapp. 1008, carved out from the 1851 territory a reservation of some 8,000,000 acres for the Crow Indians. The Reservation was further diminished in size by subsequent Acts of the Congress, *see,* 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937).[3]

The Big Horn River is a navigable water-course which traverses the heart of the Crow Indian Reservation from south to north. Prior to 1851, the United States owned the bed of the Big Horn River. The United States retained the ownership of the bed of the Big Horn River as public lands, during the time it entered into the treaties with the Crow Nation. Because it so retained the bed, the bed and the river passed to the State of Montana upon Montana's ad-

[3] *See,* the maps reproduced in *United States v. Finch,* 395 F.Supp. 205, at 215—220 (D. Mont. 1975).

mission to the Union.

The Crow Tribe of Indians is not indigenous historically to either Montana or Wyoming. The roots of this nomadic people were formed in Canada near the Winnepeg Lake area. Initially, migration took the Crow, also know as the Absorkas, to an area on the Missouri River now encompassed by the Dakotas, where the Crow joined the Mandan. Ultimately, the Crow and the Mandan quarreled and the Crow once again migrated until their meandering was impeded by the main range of the Rocky Mountains. The later migration of the Crow Nation occurred around the time the dominant society was migrating from the old world to the new world. The Crow occupancy of the land now constituting the Crow Indian Reservation is not based upon aboriginal title from time immemorial.

While the Crow Indians did not have a written language, an extensive vocabulary did exist. The language had words for hunting, fishing, elk, deer, trout, and other types of animals and fish. The language was sophisticated in the sense that significant semantical distinctions existed. The vocabulary distinguished between "rights" and "privileges."

The Crow Nation was largely dependent upon big game animals or agriculture for subsistence. The first written reference to fishing and the Crow Indians came about at a council meeting between the Crow Tribe and the Federal Government, which resulted in a further cession of the Reservation. Act of April 11, 1882, 22 Stat. 42. The evidence adduced at trial indicates that fishing was not a central part of the Crow diet. The Crow were not dependent upon canoes or other types of boats for transportation along the Big Horn River or other rivers and streams

flowing through their country.

III. TREATIES

The first contact the United States recorded in its relations with the Crow resulted in the Treaty of Friendship with the Crow Tribe in 1825. 7 Stat. 266. That treaty made no reservations of land to the Crow.

The next treaty was approved by the Senate on May 24, 1852, but is referred to as the Treaty of 1851. The Crow did not assent to this treaty until September 18, 1854.[4] The Treaty of Fort Laramie created a reservation encompassing some 38,531,174 acres. After the Treaty of Forty Laramie, the inevitable course of reservation diminishment followed.

On May 7, 1868, the Second Treaty of Fort Laramie was signed and proclaimed by the President on August 12, 1868. 15 Stat. 649. The Treaty diminished the reservation by over 30,000,000 acres. The net result of the 1868 Treaty was a reservation to the Crow of approximately 8,000,000 acres. Subsequent Congressional Acts reduced the size of the Crow Reservation to its present acreage of approximately 2,282,764.0 acres.[5] Of the 2,282,764 acres of reservation land that remain, the ownership can be broken down as follows:

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[4] Treaty of Fort Laramie, 11 Stat. 749; *Crow Nation v. United States*, 81 Ct.Cl. 238, 248 (1935).

[5] *See*, 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937). *See also, Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *DeCoteau v. District County Court*, 420 U. S.425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1973); *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L. Ed.2d 92 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962).

Type of Ownership	Acreage	Percentage of Ownership to Total Acreage
Allotted	1,187,592.34	52.02%
Tribal	379,740.64	16.64%
(Surveyed) Tribal	15,850.85	.69%
(Unsurveyed)	395,591.49	
Government Owned	1,400.50	.07%
Yellowtail Dam	6,695.64	.29%
State Lands	44,804.82	1.96%
Fee Lands	646,679.12	28.33%
TOTAL:	2,282,764.00	100.00%

The only reference the 1851 Treaty makes to hunting and fishing is in Article 5, which provided that the eight Indian nations "do not surrender the *privilege* of hunting, fishing, or passing over any of the tracts of country heretofore described." (Emphasis supplied.) Likewise, the Treaty of 1868 makes but one reference to hunting and fishing rights. That is in Article 4 of the Treaty of 1868. Neither the Treaty of Fort Laramie of 1851 nor the Treaty of the Crow Indians of 1868 made specific reference to the title of the Big Horn River and its bed.

> Article 1 of the Treaty of 1868 provided: If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained. If bad

men among the Indians shall commit a wrong or depridation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, and proof made to their agent and noticed by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws;

The reservation was described in Article 2 as that place "set apart for the absolute and undisturbed use and occupation of the Indians." Article 4 of the Treaty provides the touchstone for the claims of the Crow Tribe. It references the rights of the Indians in that they "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts."

IV. STATUTES

The General Allotment Act of 1887 and the Crow Allotment Act of 1920 specifically provided that patents in fee could be issued by the United States to allottees within the Crow Indian Reservation and thus be subject to alienation to non-Indians. This provision exists despite the language of Article 2 of the 1868 Treaty, which provided:

No persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth, they

> will, and do hereby, relinquish all title, claim or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid . . .

An examination of the treaties together with the relevant statutes reveals the vacillating policy of the United States, evident at the time.[6] The allotment system was intended to integrate the Indian into the white communities and was unilaterally imposed upon the Crow. This integration purpose is apparent in the Crow Allotment Act of 1920.[7] The Crow territory was part of the Louisiana Purchase. Both the Courts and the Congress have recognized that the object of the Louisiana Treaty was to acquire land for the formation of new states.[8] The Nebraska territory was created on May 30, 1854, and the Crow cession in the present state of Montana was included in the Dakota Territory, carved out of the Nebraska Territory on March 1, 1861. Thereafter, the Territory of Idaho was created from Eastern Washington and Western Dakota and included all of the land which now constitutes Montana. On January 16, 1864, the Territory of Idaho established what are presently the Montana counties of Missoula, Deer Lodge, Dawson, Beaverhead, Madison, Jefferson, Choteau, and Big Horn. These counties were immediately adopted as Montana counties at the Territorial Assembly at

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[6] Joe Medicine Crow, the Tribal Historian, testified that the Crow have followed agrarian pursuits intermittently for the last four centuries. *See also,* Articles 3, 6, 8, 9 and 10 of the treaty.

[7] The allotment philosophy was terminated in large part by the Indian Reorganization Act of 1934.

[8] *United States v. Brewer-Elliott Oil & Gas Co.* (D.C.Okl.), 249 F. 609, *aff'd* 8 Cir., 270 F. 100, *aff'd* 260 U.S. 77, 43 S.Ct. 60, 67 L.Ed. 140 (1922); 20 Cong.Rec., House, 815; *see also,* S.R. 75, January 23, 1888, H.R. 1025, March 13, 1888.

Bannock on December 12, 1864. The Territorial Government, meeting after the creation of the Montana Territory, adopted the acts of the Idaho Territorial Legislature. Although the Congress nullified the original acts, they were recreated by the Legislature of 1867. Thus on the date of May 7, 1868, the date of the Treaty of the Crow Cession, the Territory of Montana was located in Big Horn, Gallatin, Meagher, and Musselshell Counties.

The Organic Act of the Territory of Montana provided:

> That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Montana, until said tribe shall signify their assent to the president of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or otherwise, which it would have been competent for the government to make if this act had never passed.
>
> Act of May 26, 1864, 13 Stat. 85.

Neither the Treaty of 1851, nor the Treaty of 1868 conferred upon the Tribe the right to exclude the Crow Reservation from the Montana Territory.

Montana's Enabling Act substantially changed the language of the Organic Act of the Territory:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; . . .
>
> Act of February 22, 1889, 25 Stat. 676.

V. FISH AND GAME MANAGEMENT

On March 27, 1970, the Crow Tribe and the Bureau of Sports Fisheries and Wildlife, a federal agency, entered an agreement which provided that the Bureau would give technical assistance in the management of fishing resources on the Crow Reservation and would stock the waters of the Big Horn River and the Big Horn Canyon Recreation Area. To assist in the implementation of this plan, the Crow Tribal Council on June 20, 1970, enacted Resolution No. 70-51, which directed the Tribal officers to enter the agreement with the Bureau of Sports Fisheries and Wildlife "for the purpose of providing the Crow Tribe with fish and wildlife and the planting stock required. . . ."[9] The Fisheries management by the United States Fish and Wildlife Service actually

[9] For a discussion of the relevant background of the Crow Tribal Government, *see, Stands Over Bull v. Bureau of Indian Affairs*, 442 F.Supp. 360 (D. Mont. 1977), *aff'd* (9th Cir., May 22, 1978), vacated in part 578 F.2d 799 (9th Cir. 1978).

began on the Crow Reservation in 1964. However, a Fisheries biologist was not assigned to the reservation area until 1973, when management assistance was provided to three eastern Montana Indian reservations with special emphasis on the Crow Reservation.

On the other hand, the State of Montana has, since at least 1928, engaged in an extensive fish-stocking program throughout the waters of the Crow Indian Reservation. The plantings started in 1928 and continued up to the present time. Additionally, the State Department of Fish and Game has conducted extensive game, fishery and fowl studies on the Big Horn River without objection by either the Tribe or the Bureau of Indian Affairs. The Montana Department of Fish and Game introduced the Brown and the Rainbow Trout to the Big Horn, the Little Big Horn, and other reservation streams.

The reservation is a haven for upland gamebirds. The ringnecked pheasant, wild turkey, and Hungarian partridge, none of them indigenous to the area, were introduced by either non-Indian organizations or the Montana Department of Fish and Game. The State Department has also stocked game animals in areas adjacent to the reservation, these animals having migrated to the tribal mountain areas where they have been hunted and killed by Indian hunters.

This factual background does not substaniate either directly or by negative inference the claims of the Crow Tribe that it owns the Big Horn River and has power and authority to regulate hunting and fishing by non-Indians on reservation lands. Significantly, neither of the treaties considered contains an express grant of all land including the beds of navigable streams contained within the territorial

boundaries of the land in question.

VI. DISCUSSION

A. *The River.*

The first determination which must be made is whether the bed of the Big Horn River, within the exterior boundaries of the Crow Indian Reservation, is land held by the United States in trust for the use and benefit of the Crow Tribe, or whether it is land to which the title passed to the State of Montana upon its admission to the Union. As has been previously noted, the Big Horn River is a navigable watercourse which flows through the Crow Reservation from south to north. The United States either transferred beneficial ownership of the bed to the Crow Tribe by the Treaties of 1851 and 1868, or it retained ownership of the bed as public lands which passed to the State of Montana upon its admission to the Union. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627-628, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1969).

The disposition of this case depends upon which alternative the Governmenmt followed when it signed the treaties. The analysis of this issue must be presented in the context of, and is controlled by, the opinions of the United States Supreme Court in two cases ruling on the title to lands underlying navigable waters situated in Indian territory: *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926), and *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1969). The application of these precedents requires a delicate balance.

Early on, it was determined that a disposition by the United States of public lands bordering upon navigable waters, as a general rule, does not convey

title or dominion to the land situated below high water mark. *Shively v. Bowlby,* 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1893). In *Shively,* the United States had granted land adjacent to the Columbia River to a private party pursuant to the Oregon Donation Act, 9 Stat. 496. The Supreme Court held that absent the clearest expression of the intent to the contrary, it would not presume that the United States intended to divest itself of part of the river bed. The Court stated:

> The United States, while they hold the country as a territory, having all the powers both of national and of municipal governmement, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union. *Shively v. Bowlby,* 152 U.S. at 58, 14 S.Ct. at 569.

The principle enunciated in *Shively, supra,* was applied to transfers of land involving Indian tribes by the Supreme Court in the case of *United States v. Holt State Bank, supra.*

In *Holt State Bank,* the dispute concerned ownership of the bed of Mud Lake, a body of water lying wholly within the exterior boundaries of the Red Lake Indian Reservation in Minnesota. By treaties enacted before Minnesota was admitted into the Union, the government had recognized the right of

the Chippewa Indians to occupy the reservation. When the treaties were signed, Mud Lake was a navigable body of water. The last treaties preceding Minnesota's statehood were concluded September 30, 1854, 10 Stat. 1109, 2 Kapp. 648, and February 22, 1855, 10 Stat. 1165, 2 Kapp. 685. There was nothing in the language of the treaties, or in the background of treaty negotiations, which prompted the Court to find an express intent by the United States to dispose of the land underlying the lake. Both the Treaty of 1854 and the Treaty of 1855 provided for the cession by the Chippewa to the United States of their claimed aboriginal right to occupy certain lands. In return for that cession, the government recognized that the Chippewa had rights in the land constituting the reservation. By the Treaty of 1854, the United States did state that certain tracts of land would be "set apart and withheld from sale, for the use of the Chippewa," Article 2, 2 Kapp. 648; and the Treaty of 1855 provided that a sufficient quantity of land "be reserved and set apart . . . for the permanent home of the said Indians" within designated locations. Article 2, 2 Kapp. 685, 686. However, there was no express provision guaranteeing to the Indians exclusive possession of the tracts in either treaty. Equally significant, there were no assurances given by the United States that the lands would ever be put to any other use. The Supreme Court noted the effect of the treaties in finding that

> [t]here was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation

> of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. *Minnesota v. Hitchcock,* 285 U.S. 373, 389 [22 S.Ct. 650, 46 L.Ed. 954]. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State.
>
> *United States v. Holt State Bank,* 270 U.S. at 58-59, 46 S.Ct. at 200.

The Court followed the rule announced in *Shively* and held that title to and dominion of the lake bed remained vested in the national government and that ownership of the bed passed to the State of Minnesota on its admission to the Union.

The second principal authority which establishes the dichotomy considered here is the case of *Choctaw Nation v. Oklahoma, supra.* The Court in *Choctaw Nation* adressed an issue similar to that raised by the *Holt State Bank* case. After examining treaty grants made under different circumstances in *Choctaw Nation,* the Court reached a different conclusion as to the ownership of lands underlying navigable waters of the Arkansas River.

A series of treaties had provided for the relocation of the Choctaw and Cherokee Tribes, but the lands therein set aside were settled before the Indians could be relocated. Even so, the national and state governments exerted pressure on the Indians to move when voluntary removal failed.

As a guarantee that they would not again be forced to move, the United States promised to convey that land to the Choctaw Nation in fee simple "to insure

to them while they shall exist as a nation and live on it."

Choctaw Nation v. Oklahoma, 397 U.S. at 625, 90 S.Ct. at 1331.

Similar promises were made to the Cherokee. the *Holt State Bank* case was found to be inapplicable to the *Choctaw Nation* facts, and the Court accordingly held that the bed of the Arkansas River was held by the Indian tribes. The decision in *Cherokee Nation* was based on the forced movement of the Cherokee and Choctaw Tribes, taken together with the axiom of resolving well-founded doubts in favor of the Indian tribes. The net result overcame the presumption that the United States retained ownership of the river bed.

[1,2] With this factual and legal background, it is necessary to examine the case at hand. However, before indulging in such analysis, it is helpful to reiterate some of the presumptions upon which Indian cases are based. Treaties with the Indians must be interpreted as the Indians would have understood them, and Indian treaties are to be construed in favor of the Indians. *Choctaw Nation v. Oklahoma, supra.* Concomitantly, doubtful expressions are to be resolved in favor of the Indian parties to the treaty. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 (1930). Treaty and statutory provisions which are not clear on their face may "be clear from the surrounding circumstances and legislative history." *Cf. DeCoteau v. District Court*, 420 U.S. 425, 444, 95 S.Ct. 1082. 1093, 43 L.Ed.2d 300 (1975). Finally, there is the presumption that the United States does not intend to divest itself of the

sovereign rights in navigable waters, and in the soil under them, absent the clearest expression of intent to the contrary. *Shively v. Bowlby, supra* at 58; *United States v. Holt State Bank, supra.*

[3] Neither the Treaty of Fort Laramie of 1851 nor the Treaty of the Crow Indians of 1868 made specific reference to the title of the Big Horn River bed, a navigable stream. This case is similar in some respects to the *Choctaw Nation* case in the series of treaties involved. However, unlike the Crow Indians, the Choctaw Indians were forced to leave their aboriginal lands and the United States promised to convey different land to the Choctaw Nation in fee simple. Such a conveyance did not occur with respect to the Crow Indian Reservation. The aboriginal ownership of the Crow to the lands reserved for them is more akin to the facts presented in *Holt State Bank, supra,* even though such aboriginal title did not stem from time immemorial. The grant to the Choctaw and Cherokee indicated that no territory or state shall ever have the right to pass laws for the government of the Choctaw Nation and that no part of the land granted to them would ever be embraced in any territory or state. *See, Choctaw Nation, supra,* 397 U.S. at 625, 90 S.Ct. 1328. The treaties with the Crow Tribe do not reflect such a provision, explicitly exempting the Crow lands from ever being embraced in any territory or state. The treaties, the evidence, and the arguments presented in this case involving the Crow Indian Reservation, in particular the title to the bed and banks of the Big Horn River, most closely approximate those in the *Holt State Bank* case, *supra,* and not those in the *Choctaw Nation* case. Such analysis compels the conclusion that the bed and banks of the Big Horn River passed to the State of Montana upon its admission to the Union.

United States v. Finch, 395 F.Supp. 205, 210 (D.Mont. 1975).

B. *Hunting and Fishing.*

[4,5] The Treaty of Fort Laramie of 1851 provides in Article 5 that the Indian tribes mentioned in the treaty did not surrender their *privileges* of hunting and fishing by accepting the respective reservations, but rather that they maintained such rights as well as the right to pass over any of the tracts of land described in the treaty for the purpose of hunting and fishing.

The Treaty with the Crow Indians, dated May 7, 1868, does not contain any reference to fishing. The retention by the tribes of the privilege of fishing does not carry with it as a matter of law, nor does it grant, the exclusive right to fish. Had the exclusive *right* to fish been deemed salient to the Crow, and it was not, based upon the record which is before the Court, surely it would have been mentioned in the treaties. This is especially so when it is considered that the Absorka or Crow language distinguished between privileges and rights. A treaty of similar vintage in this state provided for the exclusive right of taking fish. *See*, the Hellgate Treaty, 12 Stat. 975, with the Flathead, Kootenai, and other Pend Oreille Indians, Article 3. With this in mind, and considering the conclusions of the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), it is apparent that the State of Montana has exclusive jurisdiction to regulate nonmember hunting and fishing within the exterior boundaries of the Crow Indian Reservation.

The issue has previously been considered by the Court of Appeals for the Ninth Circuit in the case of

United States v. Sanford, 547 F.2d 1085 (9th Cir. 1976).[10]

The *Sanford* case was a criminal case involving hunting by non-Indians on the Crow Indian Reservation, in violation of the laws of the United States and the laws of the State of Montana. The Sanfords were big game hunters and outfitters in Montana. After some preliminary arrangements with out-of-state hunters, who, unbeknownst to the Sanfords, were acting as agents of the Bureau of Sport Fisheries and Wildlife, a hunt into the Crow Indian Reservation was arranged. The party made their kill, took the cape of the elk, and went from the reservation to Wyoming. A second hunt was planned, and again the Sanfords and their hunters penetrated the exterior boundaries of the Crow Indian Reservation. A second elk was shot and killed; the animal was caped and the party left the reservation. The party next sojourned to hunt for Rocky Mountain Big Horn Sheep within Yellowstone National Park, but that hunt is not relevant to the issue considered here.

A seven-count indictment was returned against the Sanfords. Count II of the indictment charged two of the Sanfords with illegal entry on the Crow Indian Reservation, in violation of 18 U.S. C. § 1165. A third Sanford was similarly charged with the same offense but on a different day. The Ninth Circuit's instruction with respect to these counts is relevant to the case at hand. In *Sanford*, the government had

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[10] In *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976), decided prior to *Oliphant v. Suquamish*, and *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), which involved a different Indian reservation than the Crow Reservation, a contrary conclusion was reached to that reached in *United States v. Sanford*, *supra*. *See also*, *The White Mountain Apache Tribe v. State of Arizona, et al.*, *supra* n. 2.

argued that 18 U.S.C. § 1165 makes illegal the unauthorized killing of wildlife on Indian reservations. The Circuit found the contention to be ill taken, relying on the reasoning of the Montana Supreme Court in *State v. Danielson*,. 149 Mont. 438, 427 P.2d 689 (1967), in reaching conclusion. Quoting the state decision:

> *It is significant to note that § 1165 does not directly prohibit hunting and fishing but makes the act of going upon the Indian reservation a violation if done for the purpose of hunting or fishing*. . . [S]ection 1165 must be considered to be a statute providing a penalty for trespass to an Indian reservation and not an attempt by Congress to enter the field of fish and game regulation.
>
> *State v. Danielson, supra* at 691.

In *Sanford*, the government also argued that the elk which were killed on the Indian reservation were killed in violation of the Montana Fish and Game Law, R.C.M. § 26—307(3). The argument required consideration of the preliminary issue of whether or not Montana game laws applied to the activities of non-Indians on Indian reservations. The Circuit Court held that they do. This conclusion was predicated up the Montana Supreme Court's statement in *Danielson, supra.* wherein it noted that:

> [T]he State of Montana has jurisdiction to enforce its fish and game regulations on Indian reservations contained within its boundaries with respect to persons who are not tribal Indians unless precluded from doing so by an act of Congress or unless such enforcement would interfere with self-government on the reservation. *State v. Danielson*, 427 P.2d at 692-693.

[6] A paramount consideration in the *Sanford* case is that 18 U.S.C. § 1165 does not represent an attempt by the federal government to enter the arena of fish and game regulation on the Crow Indian Reservation or on any other Indian reservation. After making this observation, the Circuit noted:

> Further, we are convinced that the application of Montana game laws to the activities of non-Indians on Indian reservations does not interfere with tribal self-government on reservations. We express no opinion concerning the possible concurrent application of tribal law to non-Indians on Indian reservations under the circumstances of this case.
>
> *United States v. Sanford*, 547 F2d at 1089.

The regulation of hunting and fishing by non-Indians within the exterior boundaries of the Crow Indian Reservation does not conflict with an act or treaty of the Congress. Nor does it interfere with tribal self-government on the Crow Reservation. Montana long ago enacted a comprehensive fish and game code. See, § 26—101.1 *et seq.*, R.C.M.1947. The State of Montana does not generally enforce its hunting and fishing laws agrainst members of the Crow Tribe.[11] The Crow Reservation is regularly patrolled by game wardens employed by the Department of Fish and Game. Non-Indians are subjected to enforcement of the State's laws while they are within the exterior boundaries of the Reservation. Ultimately, the State is enfranchised to exercise its regulatory power over non-Indians on the Crow Reservation as an extension of its police powers over all land within its borders, regardless of title. *Cf. The White Mountain Apache*

[11] There was testimony presented at trial that enrolled members had, on occasion, been charged and tried for fish and game violations on fee land within the reservation.

Tribe v. State of Arizona, et al. (No. Civ. 77-867 PHX, WPC, June 13, 1978). The State's statutory and regulatory scheme does not limit what the Tribe may prohibit with respect to hunting and fishing on tribal lands; it merely provides the conduit for enforcing the State's police power within its territory where non-Indians are involved.

The question upon which the Ninth Circuit expressed no opinion has apparently been resolved in the recent case of the United States Supreme Court, *Oliphant v. Suquamish Indian Tribe, supra.* The Court granted *certiorari* in *Oliphant,* 431 U.S. 964, 97 S.Ct. 2919, 53 L.Ed.2d 1059, to decide whether or not Indian tribal courts had criminal jurisdiction over non-Indians. It found they do not. Implicit in the Supreme Court's decision in *Oliphant* is the recognition that Indian tribes do not have the power, nor do they have the authority, to regulate non-Indians unless so granted by an act of Congress. The Court noted that from the earliest treaties with many tribes, it has been presumed that the tribes did not have criminal jurisdiction over non-Indians absent a Congressional statute or treaty provision to that effect. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209. In discussing the various attempts to deal with the problem by the United States Congress, the Court noted that

> Congress' concern over criminal jurisdiction in this proposed Indian Territory contrasts markedly with its total failure to address criminal jurisdiction over non-Indians on other reservations, which frequently bordered non-Indian settlements. The contrast suggests that Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without

jurisdiction to try non-Indians.

Oliphant v. Suquamish, supra at 203, 98 S.Ct. at 1018.

While the Supreme Court did not find conclusive the commonly-shared presumption of the Congress, the Executive Branch, and the lower federal courts that tribal courts do not have power to try a non-Indian, it found the presumption to carry considerable weight. *Oliphant v. Suquamish Indian Tribe, supra* at 206, 98 S.Ct. 1011. Ultimately, the Court concluded:

. . . Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.

Oliphant v. Suquamish Indian Tribe, supra at 208, 98 S.Ct. at 1020.

Indian tribes cannot exercise both "those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.' "

Oliphant v. Suquamish.

By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citrizens of the United States except in a manner acceptable to Congress. [Quoting the 9th Circuit at 544 F.2d 1007, 1009.]

Oliphant v. Suquamish, supra at 210, 98 S.Ct. at 1021.

[7] In the case at hand, the Crow Tribe has not been given an express delegation of the power to try non-Indians on the Crow Reservation. Nor was that power specifically retained in the tribe by the course of the Treaties of 1851 and 1868 and subsequent acts dealing with the Crow Tribe. The tribe cannot

preempt a power which rests with the state government simply by enacting an ordinance inconsistent with the power and authority of the state, and consistent with tribal self-government, absent the authority of Congress. *See, Fisher v. District Court,* 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); *United States v. Mazurie,* 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). The Congress, in the dealings between states and Indian tribes, is the source of power to preempt state activity within the exterior boundaries of the Indian reservations.

The United States and the Crow Tribe have attempted to show in the trial of this case that the Tribe has continually exercised jurisdiction over hunting and fishing activities on the reservation. However, the preponderance of evidence supports a contrary conclusion. In matters of law enforcement involving non-Indians within the exterior boundaries of the Crow Indian Reservation, the Big Horn County Attorney has exercised near exclusive jurisdiction in prosecuting for offenses committed on fee land within the confines of the reservation. The Montana Department of Fish and Game wardens have patrolled the reservation and have cited on numerous occasions non-Indians for fish and game violations, whether the violations transpired on tribal, trust, or fee lands. Until approximately 1973, there was no real confrontation on the Crow Reservation regarding jurisdiction over non-Indians. The Tribe has from time to time been dissatisfied with the enforcement procedures involving nonmember hunting and fishing within the reservation; however, all parties understood that non-member hunting and fishing regulation was a power belonging to the state. Where nonmembers violated fish and game laws, the jurisdictional boundaries for dealing with

such cases were reduced to the following scheme: Montana exercised exclusive jurisdiction over nonmenber hunting and fishing on fee patent land within the confines of the reservation. The federal government exercised concurrent jurisdiction, with the state, over nonmember fishing and hunting when such fishing and hunting was done without permission on tribal or trust property. The Crow Tribe neither had nor did it exercise jurisdiction over nonmember fishing and hunting activities within the reservation. The exception to the Tribe's attempt to exercise jurisdiction over non-Indian hunting and fishing is revealed in Tribal Resolution No. 74-05, passed by the Tribal Council in 1973, and Tribal Ordinance No. 1, enacted April 12, 1975. These acts of the Tribe proscribed all nonmembers from fishing or hunting within the boundaries of the Crow Reservation. However, subsequent case law teaches that this attempted exercise of jurisdiction over non-Indians was fatally doomed.

VII. CONCLUSION

[8, 9] The common understanding of the various governmental entities involved was implicitly correct in the allocation of jurisdictional responsibility, considered in light of the *Sanford* decision, *supra*, and the United States Supreme Court's decision in *Oliphant*. The State of Montana has exclusive jurisdiction to regulate non-members hunting and fishing within the exterior boundaries of the Crow Indian Reservation on fee lands. The State of Montana and the United States Government have con-

current jurisdiction to regulate non-member hunting and fishing within the Crow Indian Reservation on tribal land or trust properties when the same transpire without the permission of the respective landowners. Finally, the Crow Tribe does not have jurisdiction over non-Indians' hunting and fishing activities within the Crow Reservation. As the Supreme Court in *Oliphant* noted:

> Indian tribes do not have inherent jurisdiction to try and punish non-Indians.

The Tribe's authority with respect to non-Indian hunters and fishermen is limited, absent an act of Congress, to authorizing non-members to trespass on tribal and allotted lands within the reservation for purposes of hunting and fishing. To paraphrase Judge Smith of this Court, the Crow Tribe has as much authority to regulate non-Indian activities within the exterior boundaries of the Crow Reservation as the Congress says it has.

The record does not reflect any treaty or act of Congress which gives the Crow Tribe the power it seeks to exercise.

From the foregoing, I make the following Declaration and Judgment:

1. That the title to the bed and banks of the Big Horn River to the high water mark is quieted in the State of Montana, and was so granted upon the State's admission to the Union.

2. That the State of Montana has exclusive jurisdiction to regulate non-Indian hunting and fishing activities on the Big Horn River and all patented land owned by non-Indians within the exterior boundaries of the Crow Indian Reservation.

3. That the State of Montana has concurrent jurisdiction with the United States to regulate non-Indian hunting and fishing activities on tribal or In-

dian lands if such activities are in violation of state law. The concurrent jurisdiction of the United States to so regulate non-Indian activities is predicated upon 18 U.S.C. § 1165.

4. The Crow Indian Tribe's exclusive rights of hunting and fishing within the exterior boundaries of the Crow Indian Reservation are limited to those lands set forth in 18 U.S.C. § 1165.

5. The Crow Indian Tribe has no authority to regulate non-Indian hunting and fishing activities within the exterior boundaries of the Crow Indian Reservation, save in granting permission to non-Indians to trespass on tribal or Indians lands for the purpose of hunting and fishing.

Pursuant to Rule 52(a), Federal Rules of Civil Procedure, this Opinion shall constitute the Court's Findings of Facts and Conclusions of Law. The Clerk is directed to enter, by separate document, a judgment consistent with the declarations set forth herein.

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellant,

v.

James Junior FINCH,
Defendant-Appellee

No. 75-2149
United States Court of Appeals,
Ninth Circuit.

Dec. 22, 1976.

Rehearing En Banc Denied
March 3, 1977.

The United States appealed from an order of the United States District Court for the District of Montana, 395 F.Supp. 205, James F. Battin, J., dismissing information charging nontribal member with trespassing on Indian lands when he fished on the banks of the Big Horn river within exterior boundaries of Crow Reservation, which had enacted tribal ordinance prohibiting nontribal members from entering reservation for fishing or hunting. The Court of Appeals, Kennedy, Circuit Judge, held that notwithstanding the submission of an agreed statement of facts prior to district court's reconsideration of earlier motion and determination to dismiss information, remand would not subject defendant to double jeopardy, so that Court of Appeals had appellate jurisdiction; that bed of Big Horn river within confines of reservation is held by United States in trust for Indian tribe, and that defendant violated statute by willfully and

knowingly fishing without lawful authority or permission of tribe.

Keith L. Burrowes, Asst. U. S. Atty. (argued), Billings, Mont., for plaintiff-appellant.

Robert W. Holmstrom (argued), of Longan & Holmstrom, Billings, Mont., for defendant-appellee.

Before CHAMBERS and KENNEDY, Circuit Judges, and WONG,* District Judge.

KENNEDY, Circuit Judge:

This case began when James Junior Finch stood on a bank of the Big Horn River and cast a fishing lure into the waters. He was charged by information with trespassing on Indian lands, a violation of 18 U.S.C. § 1165. The bank and the bed of the Big Horn River at the point where Finch stood lie within the exterior boundaries of the Crow Indian Reservation. All concede that the State of Montana owns the bank at that spot, having acquired the property by purchase. The state's chain of title can be traced to a Crow Indian who acquired the land by allotment.

Finch held a fishing license issued by the Montana State Fish and Game Commission. However, he was not a member of the Crow Tribe, and he was well aware of an ordinance promulgated by the tribe that forbade all persons who were not tribal members from entering Crow lands for fishing. The district court found that no entry had been made on Indian land and dismissed the information. 395 F.Supp. 205 (D.Mont. 1975). The Government appeals.[1]

*Honorable Dick Yin Wong, United States District Judge for the District of Hawaii, sitting by designation.

[1] While this controversy is between the United States and appellee Finch, the Crow Tribe and the State of Montana have each filed briefs as *amici curiae*.

The court below originally denied a motion by the defendant to dismiss the information. The Government and the defendant stipulated to an "Agreed Statement of Facts" and submitted the case for the court's determination. The trial court thereupon reconsidered its earlier ruling and entered an order dismissing the information. Finch asserts that submitting the stipulation of facts to the court put him once in jeopardy, and that we do not have jurisdiction over the Government's appeal because a reversal would place him in jeopardy a second time. We address this jurisdictional issue before reaching the merits.

I

[1] Our jurisdiction of the appeal by the Government is controlled by 18 U.S.C. § 3731, That statute authorizes appeals by the Government from all district court orders dismissing an indictment or information, except where the appeal would be barred by the double jeopardy clause of the Constitution. The Supreme Court recently gave careful consideration to this statute and concluded that its enactment expresses a congressional intent to "avoid creating nonconstitutional bars to the Government's right to appeal." *United States v. Wilson*, 420 U.S. 332, 339, 95 S.Ct. 1013, 1019, 43 L.Ed.2d 232 (1975). Our jurisdictional inquiry, therefore, must focus on whether the appeal is barred by the constitutional rule against double jeopardy. *United States v. Patrick*, 532 F.2d 142 (9th Cir. 1976).

[2] The threshold question is whether the defendant was once placed in jeopardy by the proceedings below. There are no mechanical rules for deciding whether jeopardy has attached. As the Supreme Court has declared, the phrase is used to mark that

"point in [the] criminal proceedings at which the constitutional purpose and policies" of the double jeopardy clause become implicated. *Serfass v. United States,* 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975), *citing United States v. Jorn,* 400 U.S. 470, 480, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). In this case, we believe that jeopardy attached in the proceedings below.

[3] Appellee's initial motion to dismiss was denied. The parties then filed an "Agreed Statement of Facts."[2] The stipulation was a submission of the case to the district court for plenary determination and decision. This stipulation constituted a waiver of a jury trial; after it was filed, the district court undoubtedly had the power to determine the guilt or innocence of the defendant. The agreed statement of facts, moreover, was relevant to the district court's ultimate decision to dismiss the information. In the trial court's opinion announcing that it had reconsidered the earlier motion to dismiss, the court expressly stated: "After a thorough review of the file, I am compelled to reconsider my order . . .." 395 F.Supp. at 207.

In at least two essential respects, this case differs from *Serfass v. United States, supra,* in which the Supreme Court held that jeopardy had not attached. In *Serfass,* the petitioner had not waived his right to trial by jury (in fact, he had requested a jury trial), and the district court had no power to determine the petitioner's guilt or innocence. By contrast, the defendant here waived his right to a jury trial, and

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[2] The statement ended with the following paragraph:

> It is . . . agreed that this matter is hereby submitted to the court for its decision without further proof unless the court should desire proof on any point or points not covered herein to the satisfaction of the Court.

after the initial denial of his motion to dismiss, was subject to the risk of a determination of guilt.

[4] This case is also distinguishable from *United States v. Choate,* 527 F.2d 748 (9th Cir. 1975), *cert. denied,* 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976). In that case, defendant waived a trial by jury, and the trial court received two stipulations of fact. Thereafter, the lower court granted the defendant's pretrial motion to dismiss on the ground that government agents had acted improperly. The Government appealed the dismissal, and the defendant argued that the waiver of the jury trial, coupled with receipt of the stipulations of fact, had placed him in jeopardy. We held that jeopardy had not attached. We reasoned that the factual stipulations received by the district court were not considered in its ruling on defendant's pretrial motion and that the parties clearly understood that the lodging of the stipulations had not put appellee in jeopardy. 527 F.2d at 751. In essence, the district court in *Choate* had no power to find the defendant guilty until it first ruled on the pretrial motion, and thus the defendant was not subject to the risk of a determination of guilt. *Choate* thus differs from this case in at least two respects: the parties in *Choate* had no expectation that the stipulations of fact would place the defendant in jeopardy and the trial court's ruling on the motion to dismiss in *Choate* was entirely unrelated to the factual stipulations. In light of the foregoing discussion, we conclude that in this case jeopardy attached at the time the case was submitted to the district court for decision.[3] *Cf. United*

[3] We emphasize that our ultimate conclusion on the jurisdictional question is unchanged even if we assume that, by dismissing the information, the trial court was declining to proceed under the stipulation. In that event, jeopardy would not have attached at all.

States v. Patrick, supra.

[5] This finding, however, does not necessarily preclude appellate jurisdiction, for "the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Illinois v. Sommerville,* 410 U.S. 458, 467, 93 S.Ct. 1066, 1072, 35 L.Ed.2d 425 (1973), *quoted in Serfass v. United States,* 420 U.S. at 390, 95 S.Ct. 1055; *United States v. Patrick,* 532 F.2d at 146; *see, e.g., United States v. Wilson,* 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975); *United States v. Kehoe,* 516 F.2d 78 (5th Cir. 1975), *cert. denied,* 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 313 (1976). Accordingly, the next step is to determine the effect of the procedures that would take place on remand were the reviewing court to decide the merits of the appeal adversely to the defendant. Where these procedures are such that an individual who has once been placed in jeopardy will be put in jeopardy again, appellate jurisdiction is absent.

We are guided in our analysis by two recent decisions of the Supreme Court, *United States v. Wilson, supra,* and *United States v. Jenkins,* 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975). In *Wilson* the trial court granted the defendant's motion to dismiss the indictment after the jury found him guilty. The Government appealed, and the defendant claimed that the Court lacked jurisdiction because reversal would result in double jeopardy. The Supreme Court held that further jeopardy would not result from a reversal, and thus established its jurisdiction to reach the substantive issues on appeal. The Court noted that the policies of the double jeopardy clause prevent the Government from getting a second chance to present its case to the trier of fact, perhaps using the experience gained during

the first proceeding to obtain a conviction. 420 U.S. at 352, 95 S.Ct. 1013. It followed that such policy considerations were not present where determination of the disputed legal issue would not result in a retrial, but would merely reinstate the jury verdict. *Id.* at 353, 95 S.Ct. 1013.

In *Jenkins* the Court considered a somewhat similar issue, presented, however, in the context of a trial to the court without a jury. At the close of the case, the district court filed findings of fact and conclusions of law, and ordered the indictment dismissed and the defendant discharged. The Supreme Court noted that in considering the double jeopardy problem, a bench trial differs from a jury trial in certain respects:

> In a case tried to a jury, the distinction between the jury's verdict of guilty and the court's ruling on questions of law is easily perceived. In a bench trial, both functions are combined in the judge, and a general finding of "not guilty" may rest either on the determination of facts in favor of a defendant or on the resolution of a legal question favorably to him. If the court prepares special findings of fact . . . it may be possible upon sifting those findings to determine that the court's finding of "not guilty" is attributable to an erroneous conception of the law whereas the court has resolved against the defendant all of the factual issues necessary to support a finding of guilt under the correct legal standard.

420 U.S. at 366-67, 95 S.Ct. at 1011. The Court pointed out, however, that this could not be done in the case before it:

> [It is not] clear to us that the District Court, in its findings of fact and conclusions of law,

> expressly or even impliedly found against respondent on all the issues necessary to establish guilt under even the Government's formulation of the applicable law. The court's opinion certainly contains no general finding of guilt, and although the specific findings resolved against respondent many of the component elements of the offense,. there is no finding on the statutory element of "knowledge."

420 U.S. at 367, 95 S.Ct. at 1012. Distinguishing *Wilson,* the Court in *Jenkins* found that it could not simply "reinstate the general finding of guilt: there was no such finding, in form or substance, to reinstate." *Id.* at 368, 95 S.Ct. at 1012. The Court thus held that the appeal had been properly dismissed.

[6] In light of the foregoing discussion, we find that the question in the instant case should be stated as follows: Once jeopardy has attached, and the proceedings are resolved in favor of the defendant, and the Government then appeals, will any proceedings after appeal require a determination of further factual issues before convicting or acquitting the defendant? If the answer is affirmative, because at the first trial sufficient facts were not established to satisfy all essential legal elements for a conviction, then the appeal is barred by the double jeopardy clause. While there may be some exceptions to this proposition, we discern none in the case before us.

In our case, unlike in *Jenkins,* it is relatively easy to separate the district judge's resolution of fact from his determination of law. Since the case was submitted on a written stipulation of facts, the district court was not required to hold further

proceedings before entry of judgement.[4]

Nevertheless, it elected to dismiss the information solely on a point of law. In this respect the case much more closely resembles *Wilson* than *Jenkins*, even though *Wilson* involved a jury trial and this case involved a bench trial. Here, as in *Wilson*, it is easy to separate factual resolutions from determinations of law. No additional facts must be found to determine whether the stipulation supports the conviction of the defendant. The only determination to be made is a legal one. Accordingly, we reach the merits of this appeal.

II

The statute under which appellee was charged prohibits entry without lawful authority or permission for the purpose of hunting, trapping, or fishing "upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use . . ." 18 U.S.C. § 1165.

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[4] The existence of an express written stipulation distinguishes this case from *United States v. Patrick*, 532 F.2d 142 (9th Cir. 1976). In that case, we found that a reversal of a judgment of acquittal would place the defendant twice in jeopardy. We noted that although there were no disputed factual issues, the defendant below had not entered into an express stipulation of facts. 532 F.2d at 147. Without such a stipulation, the trial court had no power to find the defendant guilty; if the judgment of acquittal had been reversed, a remand to the district court would have required further proceedings devoted to resolution of essential factual issues. By contrast, appellee in this case did enter into an express stipulation of facts upon which the district court would be required to make a determination of guilt if all of the defendant's legal arguments were resolved against him. The *Patrick* opinion implies that had such a stipulation of fact existed in that case, a remand to the district court would *not* have put defendant in jeopardy a second time. The case therefore supports our conclusion that a remand in this case will not place appellee twice in jeopardy.

The prosecution contends that Finch made an unauthorized entry on the riverbed by casting his lure in the water. Therefore, to resolve the issue of guilt in the case, we must first determine whether the bed of the Big Horn River within the exterior boundaries of the Crow Reservation is Indian land within the statutory definition.

The present Crow Indian Reservation is part of a large tract recognized as Crow lands by the Treaty of Fort Laramie of 1851, 11 Stat. 749, 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (hereinafter cited as Kapp.). The Treaty with the Crows of 1868, 15 Stat. 649, 2 Kapp. 1008, carved out from the 1851 territory a reservation of some 8,000,000 acres for the Crow Indians. Subsequent acts further reduced the size of the reservation.[5] The Big Horn River is a navigable watercourse[6] which flows through the heart of the Crow Indian Reservation from south to north.[7] Prior to 1851, the United States owned the bed of the Big Horn River. *Cf. United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 685 (9th Cir. 1976). The United States either transferred beneficial ownership of the bed to the Crow Tribe by the treaties of 1851 and 1868 or retained ownership of the bed as public lands, which passed to the State of Montana upon its admission to the Union.[8] Our disposition of this case depends on which alternative the Government followed when it

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[5] 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937).

[6] The parties have stipulated that the Big Horn River is now a navigable waterway.

[7] See the maps reproduced following the opinion of the district court. 395 F.Supp. at 215—20.

[8]. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627-28, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1969).

signed the treaties. Our examination is controlled by the opinions of the Supreme Court in two cases ruling on title to lands underlying navigable waters situated in Indian territory: *United States v. Holt State Bank,* 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926) and *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1969). Correct application of these precedents is a delicate matter, as the two cases seem to fall on either side of the present controversy.

[7] It was early determined, before the *Holt* and *Choctaw* cases arose, that a disposition by the United States of public lands bordering on navigable waters, as a general rule, does not convey title or dominion to the lands situated below high water mark. *Shively v. Bowlby,* 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1893).[9] In *Shively* the United States had granted land adjacent to the Columbia River to a private party pursuant to the Oregon Donation Act, 9 Stat. 496. The Supreme Court held that absent the clearest expression of intent to the contrary, it would not presume that the United States intended to divest itself of part of the riverbed. The Court stated:

> The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most

[9] Our discussion assumes that the Big Horn River was navigable in 1851 and 1868. Our treaty interpretation would follow *a fartiori* if the river was not navigable when the treaties of 1851 and 1868 were signed.

> in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

152 U.S. at 58, 14 S.Ct. at 569. This principle of construction, applied in *Shively* to a grant to an individual owner, was subsequently invoked by the Supreme Court in a case concerning a transfer of land to Indian tribes, *United Staes v. Holt State Bank, supra.*

In *Holt State Bank* the dispute concerned ownership of the bed of Mud Lake, which lay wholly within the exterior boundaries of the Red Lake Reservation in the State of Minnesota. The Government, by treaties enacted before Minnesota was admitted to the Union, had recognized the right of the Chippewa Indians to occupy the reservation. The last relevant treaties preceding Minnesota statehood were concluded September 30, 1854, 10 Stat. 1109, 2 Kapp. 648, and February 22, 1855, 10 Stat. 1165, 2 Kapp. 685. At the time the treaties were signed, Mud Lake was a navigable body of water.

The Court found nothing in the language of the treaties or the background of the treaty negotiations to show an expressed intent by the United States to dispose of the lands underlying Mud Lake. Both the treaty of 1854 and the treaty of 1855 provided for the cession by the Chippewas to the United States of their claimed aboriginal right to occupy certain lands.[10] In return for that cession, the Government

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[10] Treaty with the Chippewa, 1854, Art. 1, 2 Kapp. 648; Treaty with the Chippewa, 1855, Art. 1, 2 Kapp. 685.

recognized that the Chippewas had rights in the land comprising the Red Lake Reservation. By the treaty of 1854, the United States did state that certain tracts of land were to be "set apart and with[held] from sale, for the use of the Chippewas," Art. 2, 2 Kapp. 648; and the treaty of 1855 provided that a sufficient quantity of land "be reserved and set apart . . . for the permanent homes of the said Indians" within designated locations. Art. 2, 2 Kapp. 685, 686. However, no express provisions guaranteeing to the Indians exclusive possession of the tracts were set out in either treaty, nor were any assurances given by the United States that the lands would never be put to any other use. The Supreme Court characterized the effect of the treaties as follows:

> There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein . . .. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory. . ..

270 U.S. at 58, 46 S.Ct. at 200. Following the rule announced in the *Shively* case, the Court held that title and dominion of the lake bed remained vested in the national government and that ownership of the bed passed to the State of Minnesota on its admission to the Union.

In *Choctaw Nation V. Oklahoma, supra,* the second principal authority to be considered on this question, the Supreme Court, after examining treaty grants made under different circumstances, reached a different conclusion as to the ownership of lands underlying navigable waters. The Court was presented with the issue whether treaty grants from the United States to the Cherokee and Choctaw Indians con-

veyed title to parts of the Arkansas River. A series of treaties had provided for the relocation of the Choctaw and Cherokee tribes, but so great was the force of our westward expansion that part of the lands set aside for these Indians had already been settled before the Indians could be relocated. Attempts at further voluntary removal failed, and the national government, as well as the states of Georgia and Mississippi, started to exert pressure on the Indians. The Supreme Court described what followed:

> Thus faced with the prospect of losing both their lands and way of life, the Choctaws agreed in 1830 to leave Mississippi and to move to new lands west of the Arkansas territory. As a guarantee that they would not again be forced to move, the United States promised to convey the land to the Choctaw Nation in fee simple "to inure to them while they shall exist as a nation and live on it."

397 U.S. at 625, 90 S.Ct. at 1331. Similar promises were made to the Cherokees. *Id.* at 629, 90 S.Ct 1328. The Court concluded that this background, together with the rule of construction that well-founded doubts should be resolved in favor of the Indian tribes, were sufficient to overcome the presumption that the United States retained ownership of the riverbed. Accordingly, it found the *Holt State Bank* case inapplicable and held that the bed of the Arkansas River, at the disputed locations, was owned by the Indian tribes.

Turning to the case before us, we first examine the negotiations and background of the two relevant treaties with the Crows. These are the Treaty of Fort Laramie of 1851, *supra*, and the Treaty with the Crows of 1868, *supra*. The history and negotiation of the treaties were considered in detail by the Court of

Claims in *Crow Tribe of Indians v. United States,* 284 F.2d 361, 151 Ct.Cl. 281 (1960); *Crow Nation v. United States,* 81 Ct.Cl. 238 (1935); and *Fort Berthold Indians v. United States,* 71 Ct.Cl. 308 (1930). In brief, the negotiations for the Treaty of Fort Laramie of 1851 were precipitated by the increasing number of settlers who were crossing Indian lands on the westward journey to California, commencing in 1849 and 1850. The travelers freely used Indians lands for hunting buffalo and other game, and consumed timber and forage in increasing quantities. The Indians resented, and in some cases violently resisted, these incursions. Internecine warfare between different tribes over unsettled and ill-defined boundaries compounded the danger. The United States began negotiations with the Indians to stop these hostilities.

The Treaty of Fort Laramie of 1851 was concluded between the United States and eight Indian nations, including the Crows. On their face, the terms of the Treaty of Fort Laramie of 1851 do not consitute a clear and unambiguous grant of lands from the federal government to the Indian tribes. Article 5 of the treaty is cast as a covenant among the tribes alone to recognize specified boundaries for their respective territories, and from this clause, the United States would not appear to be a party to the recognition of Indian boundaries. 2 Kapp. 594.

Other provisions of the treaty lend support to a contrary reading. For example, in Article 3 the United States undertook to protect the Indians "against the commission of depredations by the people of the said United States," after the ratification of the treaty. *Id.* By Article 2, the Indians conceded to the United States the right "to establish roads, military and other posts, within

their respective territories." *Id.* The treaty also provides for monetary compensation for the concessions by the tribes, as well as for damage to the Indian nations both past and future. Art. 7, *id.* at 595.

By negative inference, these terms are susceptible to the interpretation that the Government of the United States recognized the Indian lands as belonging to the tribes. But they fall far short of constituting an express grant of all lands, including the beds of navigable streams, contained within the territorial boundaries.

Of more help to the appellant's position are the assurances that were given to the Indians by the Government during the negotiations preceding the 1851 treaty. The territories at issue were referred to as "your country" and "your land" and "your territory."[11] Similar references are contained in internal governmental communications."[12] It is principally in light of this background that the Court of Claims reached the conclusion that the United States, by the Treaty of Fort Laramie of 1851, recognized the title of the Crow Tribe to the lands described as theirs in Article 5 of the treaty. *Crow Tribe of Indians v. United States, supra,* at 371.

[8, 9] We need not, however, resolve this case solely

[11] *See Crow Tribe of Indians v. United States,* 284 F.2d 361, 366-67, 151 Ct.Cl. 281 (1960), *quoting* from an address by Treaty Commissioner Mitchell at the initial Council with the assembled representatives of the eight Indian Nations, held on September 8, 1851, reported in the St. Louis Republican, Oct. 26, 1851.

[12] *See* letter from Commissioner of Indian Affairs, W. Medill, to the Secretary of the Interior, June 15, 1849, *quoted in Crow Tribe of Indians v. United States,* 284 F.2d 361, 365, 151 Ct. Cl. 281 (1960); 1849 Report to Secretary of the Interior from Commissioner of Indian Affairs, *quoted in Crow Tribe of Indians, supra,* at 366; *Cf.* Letter from Comission of Indian Affairs to Treaty Commissioner Mitchell, May 26, 1851, S.Doc. No. 53, 70th Cong., 1st Sess. (1851), 4 Kapp. 1074—75, *quoted in Crow Tribe of Indians, supra,* at 366.

by reference to the Treaty of Fort Laramie of 1851. *Choctaw Nation, supra,* directs us to interpret the terms of an Indian treaty in light of its history and the negotiations preceding it and to construe doubtful language in favor of the Indians. The second relevant treaty, the Treaty with the Crows of 1868, when interpreted in light of its negotiations and the earlier treaty, convinces us that the national government, in 1868, did cede exclusive rights to the reservation lands. This cession, moreover, included rights in the riverbed.

Some fifteen years after the treaty of 1851, the Crow Tribe was approached anew by the Government. The purpose of the Government in the ensuing negotiations with the Crows was similar to that in its earlier negotiations with the Choctaw and Cherokee tribes: to reduce the size of the territory earlier designated as belonging to the tribe. During the negotiation of this second treaty, the Government, now acting through the Commissioner of Indian Affairs, again used language indicating that the Crows were to own the territory covered by the treaty.[13] Furthermore, the terms of the 1868 treaty

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[13] *Crow Tribe of Indians v. United States,* 284 F.2d 361, 367 n.3. The briefs filed by the United States and the *Crow Tribe in Crow Nation v. United States,* 81 Ct.Cl. 238 (1935), quote from the address of Commissioner Taylor to the representatives of the Crow Tribe at the beginning of the negotiations of the Treaty of 1868 at Fort Laramie on November 12, 1867, set out in the record of that case. 671 Printed Records of the Court of Claims 921-22, 1343. Commissioner Taylor said to the Crows, in part:

> My friends, chiefs, headmen, and warriors of the Crow Nation: * * * At our invitation you have come a long way, through much difficulty, to meet us. * * * Your Great Father at Washington, though so far away from you, is well informed of your friendship toward us. * * * He knows also, of some of the troubles and difficulties that surround you. He has sent us to see you in order that he may learn more fully, from your own lips, your true situation, and that he may take all necessary steps to remove those difficulties and to make your way smooth for the future.

themselves evidence an intent on the part of the United States to recognize that the Crow Indians were to have beneficial ownership of all lands within the exterior boundaries of the reservation. The national government explicitly agreed that such lands would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them . . .." Art. 2, 15 Stat. 649, 2 Kapp. 1008. The treaty continues:

> [T]he United States now solemnly agrees that no person, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians. . ..

> We learn that valuable mines have been discovered in your country, which, in some instances, are taken possession of by the white people. We learn that roads are laid out and traveled through your lands; that settlements have been made upon your lands; that your game is being driven away and is fast disappearing. We know, also, that the white people are rapidly increasing and are taking possession of and occupying all the valuable lands.
>
> Under these circumstances we are sent by the Great Father and the great council at Washington to arrange some plan to relieve you, as far as possible, from the bad consequences of this state of things and to protect you from future difficulties. We desire to set apart a tract of your country as a home for yourselves and children forever, upon which your Great Father will not permit the white man to trespass. We wish you to mark out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest, leaving to you, however, the right to hunt upon it all as long as the game lasts.

Id. at 921-22.

Id.[14]

Both the assurances given to the Indians during the negotiation of the treaty of 1868, considered against the backgrround of the treaty of 1851, and the explicit language of the 1868 treaty could have had no other meaning in the minds of the Indians than that the Government recognized that all the lands within the metes and bounds of the reservation were to be theirs. We thus conclude that the United States, by signing the treaty of 1868 with the Crows, intended to grant them dominion and control over that portion of the bed of the Big Horn River situated within the reservation,[15] subject to the retained power of the United States to exercise its paramount right to control navigation on the river.

It is true that the Treaty with the Crows of 1868 does not contemplate, by its express terms, that a patent will issue to convey the land to the Indian nation, nor does it contain an explicit promise that no part of the land granted shall be embraced in any territory or state, as did the treaties with the Choctaws and the Cherokees considered in *Chioctaw Nation.* But the absence of similar provisions in the treaty with the Crows is not determinative. We rule, in light of the foregoing, that in establishing the Crow Reservation, the United States intended that all lands therein, in-

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[14] By Article 11 of the treaty, the United States undertook that "[n]o treaty for the cession of any portion of the reservation [therein] described, which may be held in common [would] be of any force or validity as against the said Indians unless executed and signed by, at least, a majority of all the adult male Indians occupying or interest in the same . . .." 2 Kapp. at 1011. Such language also assumes that the United States recognized the extensive ownership rights of the Crow Tribe in the reservation lands.

[15] *Montana Power Co. v. Rochester,* 127 F.2d 189 (9th Cir. 1942), this court reaches a similar result in construing the Treaty of July 16, 1855, 12 Stat. 975, 2 Kapp. 722, negotiated with the Confederated Tribes of the Flathead, Kootenai, and Upper Pend d'Oreilles Indians.

cluding the riverbed, were to be for the exclusive use of the tribe.

Appellee has referred us to authorities in this circuit which, when deciding in doubtful cases whether the United States intended to convey lands underlying navigable waters to Indian tribes, inquire whether the livelihood of the Indians centered around fishing.[16] He argues that since there is no evidence that the Crow Indians used the river as a source of food the Government could not have intended to grant the riverbed to the Crow Tribe. Appellee misapprehends the purpose of Congress in creating the Crow Reservation. By establishing a reservation as a "permanent home" for the Crow Indians, *see* Treaty with the Crows of 1868, Art. 4, 2 Kapp. 1008, 1009, the Government manifestly intended to set aside lands which would provide the tribe with the food and natural resources upon which their livelihood depended. It is true that the Crow Indians, in 1868, were predominantly hunters.[17] The aim of the United States, however, was to fix the Crows in one location and to reorient their way of life toward

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[16] *E. g., Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963); *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946). *See also Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918.

[17] Published histories of the Crow Tribe indicate that the Crow Indians engaged principally in the hunting of large game such as elk and buffalo. Fishing was neither a primary nor an important source of food or industry. In his definitive study of the Crow Tribe, R. Lowie states:

> A Crow was not happy without a diet of the flesh of ruminants. Boys went out shooting rabbits for fun, but that would be starvation fare for adults. I have never met a reference to eating of fish; berries, and roots dug up by the women formed a regular part of the ancient bill of fare but only as seasoning or dessert; and the corn traded in from the Hidatsa was eaten for the sake of variety rather than as a substitute for meat.

R. Lowie, The Crow Indians 72 (1938).

"agricultural and other pursuits."[18] We find it inconceivable that the United States intended to withhold from the Indians the right to sustain themselves from any source of food which might be available on their reservation. It must have been no mystery to the Government that the Crow Tribe, whose nomadic ways they sought to change, might eventually be forced to derive their existence from a source other than big game, should the large herds of buffalo and elk roaming the plains become extinct by accident of nature or decimation by man. *Cf. Menominee Tribe of Indians v. United States,* 388 F.2d 998, 179 Ct.Cl. 496, 1002 (1967) *aff'd,* 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed2d 697 (1968). We therefore decline to adopt an interpretation which would mean that the treaty of 1868 deprived the Crow Indians of potential control over a source of food on their reservation.[19]

Appellee argues that regardless of our determination as to ownership of the riverbed, he had a right to fish from the bank. Casting a fishing line and lure from a riverbank is an intrusion wholly sufficient to constitute an entry upon the riverbed. *See* W. Prosser, Handbook of the Law of Torts § 13 at 69 (4th ed. 1971). Appellee contends, however, that as

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[18] *See* letter from C. E. Mix, Acting Commissioner of Indian Affairs, to W. J. Cullen, Special Agent for Montana, April 30, 1868, informing Cullen of his appointment by the President as a Treaty Commissioner and instructing him of his duties, *quoted in part, Crow Nation v. United States,* 81 Ct.Cl. 238, 250 (1935).

[19] It should further be noted that the cases cited in note 15, *supra,* where an examination of the lifestyles of the Indian tribes was considered particularly important, involved controversies over the location of the exterior boundaries of lands set aside for the Indians. In the case before us, it is clear that the part of the Big Horn River at issue is within the metes and bounds of the Crow Reservation. *Cf. Choctaw Nation v. Oklahoma,* 397 U.S. 620, 628, 90 S. Ct. 1328, 25 L.Ed.2d 615 (1969).

the state's licensee he was exercising a privileged reparian right of access to the river, incident to Montana's ownership of the bank, and that he was not guilty of a "trespass on Indian lands" when he entered upon the riverbed to fish. We disagree.

[10,11] Before explaining the principles of riparian ownership that are controlling in this case, we note that our determination of these questions is announced as a matter of federal law. This results from the circumstances of the original grant of the reparian lands here in question. The State of Montana is, by purchase, the successor in interest of an original patentee whose grant was in fee simple from the United States. The riverbank in question originally constituted part of lands held by the United States in trust for the Crow Tribe, and it was deeded by the United States to the state's earliest predecessor in title, pursuant to the General Allotment Act of 1887, 24 Stat. 338, 25 U.S.C. §§ 331 *et seq.* When the national government holds trust ownership of a navigable stream bed and the lands littoral to it, and thereafter conveys the banks of the stream, the nature and extent of riparian rights conveyed by deeds to such lands must be determined as a matter of federal law. *The Confederated Salish and Kootenai Tribes v. Namen*, 534 F.2d 1376 (9th Cir. 1976), *aff'g* 380 F.Supp. 452 (D.Mont. 1974).

In the *Namen* case this Court concluded that Congress must have intended that grants of riparian lands under the Indian Allotment Acts should carry riparian rights of access and wharfage. 534 F.2d at 1377. It is therefore clear that the State of Montana and its licensees have a right of access to the waters of the Big Horn River at the location in question. It does not follow, however, that Montana's right of access to the waters of the river includes a protected

right to enter upon the riverbed for the purpose of fishing. *Cf. United States v. Pollmann*, 364 F.Supp. 995, 1000 (D.Mont. 1973). In order to prevail, appellee therefore must demonstrate the existence of an independent riparian right to fish inuring to the State of Montana by virtue of its riparian ownership, and that such right is paramount to the regulatory authority exercised by the national government and the Indian tribe.

[12] We find little guidance in the decided cases for resolving questions concerning the source or extent of a riparian right to fish in navigable waters as a matter of federal common law. The authorities that have come to our attention involve the interpretation of state or territorial law, and they are generally inconclusive on the subject. A majority of the cases contain oblique references to a riparian right to fish in navigable waters but give no indication of the limitations on its exercise.[20] Those few cases which discuss the dimensions of the riparian right to fish express two different views. The first group states that the right of a riparian owner to fish in navigable waters is no greater than the common right of

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[20] *See, e.g., United States v. Sexton Cove Estates*, 526 F.2d 1293, 1300 n.18 (5th Cir. 1976); *Springer v. Joseph Schlitz Brewing Co.*, 510 F.2d 468, 470 (4th Cir. 1975); *Burns v. Forbes*, 412 F.2d 995, 998 (3rd Cir. 1969); *United States v. 220.0 Acres of Land, State of Md.*, 306 F.Supp. 138, 151 (D.Md. 1969). *See also* G. Thompson, Real Property § 274 (2d ed. 1964).

The only facet of the right which seems well established is that a riparian owner has no exclusive right to fish in navigable waters in the absence of an express grant and, as a corollary, may not prevent the public from fishing in the navigable waters contiguous to his land. *See, e.g.*, 2 American Law of Property § 9.49 (A. J. Casner ed. 1952); H. Farnham, Water and Water Rights 375 (1904); Waters and Water Rights § 36.4(A) at 198 (R. Clark ed. 1967); S. Wiel, Water Rights in the Western States § 907 (3d ed. 1911); Annot., 47 A.L.R.2d 381; 35 Am.Jur.2d *Fish and Game* § 11; 36A C.J.S. Fish §§ 6,8.

fishing enjoyed by the general public,[21] and from this it would follow that the riparian right to take fish is simply a right of access, from which one cannot derive an additional interest in land, a *profit a prendre* for fishery. The second view appears to recognize a riparian right to fish which is superior to the common right of fishery.[22]

[13] Despite these differences, however, the cases which address the point indicate that the riparian right to fish, whether it is a *profit a prendre* or simply the means of access to a right that is enjoyed by all, is in either event subject to close regulation by the governing authorities;[23] and we need go no further than to recognize this principle to resolve the instant case. We hold that the Government has exercised regulatory power which is superior, on the facts of this case, to any riparian right to fish held by the State of Montana or its licensees.

Appellee would deny that the United States, either alone or in conjunction with the Crow Tribe, is exercising a regulatory power in this case, and contends that the Crow Tribe Ordinance which closed Indian lands to fishing was promulgated without authority. We reject that argument.

[14-16] Even assuming that the authority of the Crow Tribe to control access to its own reservation is

[21] *International Shoe co. v. Heatwole*, 126 W.Va. 888, 30 S.E.2d 537, 540, (1944); *Small v. Wallace*, 124 Me. 365, 129 A. 444, 445 (1925).

[22] *Ross v. Mayor and Council of Borough of Edgewater*, 115 N.J.Law 477, 180 A. 866, 870 *aff'd*, 116 N.J.Law 447, 184 A. 810, *cert. denied*, 299 U.S. 543, 57 S.Ct. 37, 81 L.Ed. 400 (1935).

[23] *C. J. Hendry Co. v. Moore*, 318 U.S. 133, 135, 63 S.Ct. 499, 87 L.Ed. 663 (1943) and cases cited therein; *United States v. Pollmann*, 364 F.Supp. 995, 1000 (D.Mont. 1973); *Corsa v. Tawes*, 149 F.Supp. 771, 773 (D.Md.), *aff'd per curiam*, 355 U.S. 37, 78 S.Ct. 116, 2 L.Ed.2d 70 (1957). *See* H. Farnham, Water and Water Rights 375, 382 (1904); S. Wiel, Water Rights in the Western States § 907 (3rd ed. 1911); 36A C.J.S. *Fish* §§ 8, 26.

insufficient to sustain the closure of its lands to fishing by non-Indians, *but cf. Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976), the authority to withhold permission to enter for fishing, hunting, or trapping has been expressly conferred on the tribe by the promulgation of 18 U.S.C. § 1165, an enactment clearly within the national power. The language and the history of 18 U.S.C. § 1165 show that the right of Indians to control hunting, trapping and fishing on their lands is a prerogative of ownership which the United States recognizes as a matter of federal law. It was the intent of Congress that "Indian property owners should have the same protection as any other property owners" such as, for example, "a private hunting club [which] may keep nonmembers off its game lands or . . . may issue a license for a fee."[24] Under the Act, a tribe may

[24] H.Rep. N. 625, 86th Cong., 2d Sess. 2; S.Rep. No. 1686, 86th Cong., 2d Sess. 2. Prior to the enactment of section 1165, Indian property owners could not protect their lands against trespassing by non-Indians for the purpose of hunting, trapping, and fishing. Both the House and the Senate reports stated that "[n]on-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges." H.Rep. No. 625, *supra*, at 2; S.Rep. No. 1686, *supra*, at 2. (The correctness of that assumption may now be questioned in light of our recent decision in *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976).) Furthermore, there were no federal laws which could be invoked against trespassers. The House report notes:

> There is a Federal statute making it an offense for a non-Indian to hunt or trap on lands of treaty tribes except for subsistence (25 U.S.C. 216). However, as pointed out in the report of the Secretary of the Interior, this act does not cover fishing, is limited to lands of tribes with treaties, and in effect sanctions trespass if it is "for subsistence in Indian country." To this might be added the practical fact that some U.S. attorneys hesitate to prosecute under this act which dates back to 1834, because of the difficulty of proof on the subsistence point and mainly because there is a feeling that the 1834 act was designed for the old-time professional hunter and trapper, not the weekenders or local rod-and-gun members who pose the modern problem.

H.Rep. No. 625, *supra*, at 2. The legislation was thus intended to provide sanctions for hunting, trapping, and fishing on Indian lands

refuse entry for fishing on its lands just as an individual Indian owner might do, and the sanctions apply in either case. The Crow Tribal Ordinance dated October 13, 1973, by which nonmembers of the tribe were prohibited from fishing within the confines of the reservation, was ample notification by the beneficial owners of the bed of the river within the reservation that consent to entry for such purposes was withheld.[25]

[17] Appellee finally contends that the ordinance which bans all nontribal members from fishing on the Crow Reservation denies him equal protection of the laws guaranteed to nontribal members by 25 U.S.C. § 1302(8), and is therefore void. The Supreme Court rejected similar arguments in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). *See also Moe v. The Confederated Salish and*

"without the consent in the form of a license or permit for which a fee can be charged, by the Indian or tribe concerned." H.Rep. No. 625, *supra*, at 1. *See also* Letter from Assistant Secretary of the Interior Ernst, to Rep. Celler, Chairman of the Committee on the Judiciary, February 13, 1958, which states in pertinent part:

> In a great many instances, fish and game are much more plentiful on Indian reservations than on adjacent lands, and non-Indian hunters and fishermen come onto the reservations to hunt and fish. Indian tribes have the right to control or to prohibit hunting and fishing on their reservations, and to charge fees for permitting hunting and fishing. Sometimes the money derived from hunting and fishing permits represents a sizable portion of the tribal income.

H.Rep. No. 625, *supra*, at 4.

[25] That the waters of the Big Horn River are navigable is irrelevant to the question whether or not there was a prohibited entry for the purposes of fishing. We have expressly observed that there is no inherent conflict between the Government holding lands in trust exclusively for Indian fisheries and its also holding the waters over such lands in trust for the purposes of navigation. *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946). It is well settled that the United States may exercise its power to protect Indian fisheries even as to waters that are subject to the public easement of navigation. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918).

Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 480, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). Its explanation for sustaining the statute specially applicable to the Indians in that case is equally applicable to the tribal ordinance at issue here.

We conclude that the bed of the Big Horn River within the confines of the Crow Indian Reservation is held by the United States in trust for the Indian tribe and that appellee violated 18 U.S.C. § 1165 by willfully and knowingly fishing without lawful authority or permission of the tribe.

The order of the district court dismissing the information is accordingly reversed, and the cause is remanded for entry of judgment based on the stipulation filed in the district court by both parties to this cause.

REVERSED AND REMANDED.

APPENDIX D

Articles of the treaty made and concluded at Fort Laramie, in the Indian Territory, between D. D. Mitchell, superintendent of Indian affairs, and Thomas Fitzpatrick, Indian agent, commissioners specially appointed and authorized by the President of the United States, of the first part, and the chiefs, headmen, and braves of the following Indian nations, residing south of the Missouri River, east of the Rocky Mountains, and north of the lines of Texas and New Mexico, viz, the Sioux or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros-Ventre Mandans, and Arrickarus, parties of the second part on the seventeenth day of September, A. D. one thousand eight hundred and fifty-one.[a]

ARTICLE 1. The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace.

ARTICLE 2. The aforesaid nations do hereby recognize the right of the United States Government to establish roads, military and other posts, within their respective territories.

ARTICLE 3. In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of

[a] This treaty as signed was ratified by the Senate with an amendment changing the annunity in Article 7 from fifty to ten years, subject to acceptance by the tribes. Assent of all tribes except the Crows was procured (see Upper Platte C., 570, 1853, Indian Office) and in subsequent agreements this treaty has been recognized as in force (see post p. 776).

all depredations by the people of the said United States, after the ratification of this treaty.

ARTICLE 4. The aforesaid Indian nations do hereby agree and bind themselves to make restitution or satisfaction for any wrongs committed, after the ratification of this treaty, by and band or individual of their people, on the people of the United States, whilst lawfully residing in or passing through their respective territories.

ARTICLE 5. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, *'viz:*

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the roads leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

The territory of the Gros Ventre, Mandans, and Arrickasas Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning.

The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell

River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head-waters of Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.

The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head-waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Bute or the place where the road leaves the north fork of the Platte River, thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fe' road; thence in a northwesterly direction to

the forks of the Platte River, and thence up the Platte River to the place of beginning.

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

ARTICLE 6. The parties to the second part of this treaty having selected principals or head-chiefs for their respective nations through whom all national business will hereafter be conducted, do hereby bind themselves to sustain said chiefs and their successors during good behavior.

ARTICLE 7. In consideration of the treaty stipulations and for the damages which have or may occur by reason thereof to the Indian nations, parties hereto, and for their maintenance and the improvement of their moral and social customs, the United States bind themselves to deliver to the said Indian nations the sum of fifty thousand dollars per annum for the term of ten years, with the right to continue the same at the discretion of the President of the United States for a period not exceeding five years thereafter, in provisions, merchandise, domestic animals, and agricultural implements, in such proportions as may be deemed best adapted to their condition by the President of the United States, to be distributed in proportion to the population of the aforesaid Indian nations.

ARTICLE 8. It is understood and agreed that should any of the Indian nations, parties to this treaty, violate any of the provisions thereof, the United States may withhold the whole or a portion

of the annuities mentioned in the preceding article from the nation so offending, until in the opinion of the President of the United States, proper satisfaction shall have been made.

In testimony whereof the said D. D. Mitchell and Thomas Fitzpatrick commissioners as aforesaid, and the chiefs, headmen, and braves, parties hereto, have set their hands and affixed their marks, on the day and at the place first above written.

D.D. Mitchell
Thomas Fitzpatrick
Commissioners.

Sioux:
Mah-toe-wha-you-whey, his x mark.
Mah-kah-toe-zah-zah, his x mark.
Bel-o-ton-kah-tan-ga, his x mark.
Nah-ka-pah-gi-gi, his x mark.
Mak-toe-sah-bi-chis, his x mark.
Meh-wha-tah-ni-hans-kah, his x mark

Cheyennes:
Wah-ha-nis-satta, his x mark.
Voist-ti-toe-vetz, his x mark.
Nahk-ko-me-ien, his x mark.
Koh-kay-y-wh-cum-est, his x mark.

Arrapahoes:
Be-ah-te-a-qui-sah, his x mark.
Neb-ni-bah-seh-it, his x mark.
Beh-kah-jay!beth-sah-es, his x mark.

Crows:
Arra-tu-ri-sash, his x mark.
Doh-chepit-seh-chi-es, his x mark.

Assinaboines:
Mah-toe-wit-ko, his x mark.
Toe-tah-ki-eh-nan, His x mark.

Mandans and Gros Ventres:
Nochk-pit-shi-toe-pish, his x mark.
She-oh-mant-ho, his x mark.

Arickarecs:
Koun-hei-ti-shan, his x mark.
Bi-atch-tah-wetch, his x mark.

In the presence of—
A. B. Chambers, secretary.
S. Cooper, colonel, U.S. Army.
R. H. Chilton, captain, First Drags.
Thomas Duncan, captain, Mounted Riflemen.
Thos.G.Rhett, brevet capt.R.M.R.
W. L. Elliott, first lieutenant R. M. R.
C. Campbell, interpreter for Sioux.
John S. Smith, interpreter for Cheyennes.
Robert Meldrum, interpreter for the Crows.
H. Culbertson, interpreter for Assiniboines and Gros Ventres.
Francois L'Etalie, interpreter for Arickarees.
John Pizelle, interpreter for the Arrapahoes.
B. Gratz Brown.
Robert Campbell.
Edmund F. Chouteau.

APPENDIX E

TREATY WITH THE CROWS, 1868.

Articles of a treaty made and concluded at Fort Laramie, Dakota Territory, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Crow Indians, they being duly authorized to act in the premises.

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they refuse willfully so to do the person injured shall be reimbursed for his loss from

the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined, and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating, or because of his violating, the provisions of this treaty or the laws of the United States shall be re-imbursed therefore.

ARTICLE 2. The United States agrees that the following district of country, to wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said

Indians, and henceforth they will, and do hereby. relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE 3. The United States agrees, at its own proper expense, to construct on the south side of the Yellowstone, near Otter Creek, a warehouse or store-room for the use of the agent in storing goods belonging to the Indians, to cost not exceding twenty-five hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle-machine attached, the same to cost not exceeding eight thousand dollars.

ARTICLE 4. The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

ARTICLE 5. The United States agrees that the

agent for said Indians shall in the future make his home at the agency-building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint, by and against the Indians, as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be

delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow land book."

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

ARTICLE 7. In order to insure the civilization of the tribe entering into this treaty, the necessity of education is admitted, especially by such of them as are, or may be, settled on said agricultural reservation; and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children, between said ages, who can be induced or compelled to attend school, a house shall be provided, and a teacher, competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied

that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seed and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seed and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

ARTICLE 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house, on the reservation herein provided for, on the first day of September of each year for thirty years, the following article, to wit:

For each male person, over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woolen socks.

For each female, over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Af-

fairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent, each year, to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And, in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming, and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as, from time to time, the condition and necessities of the Indians may indie ate to be proper. And if, at any time within the ten years, it shall appear that the amount of money needed for clothing, under this article, can be appropriated to better uses for the tribe herein named, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery; and it is expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation, and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated

with them who shall remove to the reservation herein described, and commence farming, one good American cow and one good, wellbroken pair of American oxen, within sixty days after such lodge or family shall have so settled upon said reservation.

ARTICLE 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE 11. No treaty for the cession of any portion of the reservation herein described, which may be held in common, shall be of any force, or validity as against the said Indians unless executed and signed by, at least, a majority of all the adult male Indians occupying or interested in the same, and nocession by the tribe shall be understood or construed in such a manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him as provided in Article 6 of this treaty.

ARTICLE 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent may grow the most valuable crops for the respective year.

W. T. Sherman,
Lieutenant-General.
Wm. S. Harney,
Brevet Major-General and Peace Commissioner.
Alfred H. Terry,
Brevet Major-General.

C. C. Augur,
Brevet Major-General.
John B. Sanborn.
S. F. Tappan.
Ashton S. H. White, Secretary.

Che-ra-pee-ssh-ka-te, Pretty Bull, his x mark. [seal]
Chat-sta-he, Wolf Bow, his x mark. [seal]
Ah-be-che-se, Mountain Tail, his x mark. [seal]
Kam-ne-but-sa, Black Foot, his x mark. [seal]
De-sal-ze-cho-se, White Horse, his x mark.____[seal]
Chin-ka-she-arache, Poor Elk, his x mark.____[seal]
E-sa-woor, Shot in the Jaw, his x mark._____[seal]
E-sha-chose, White Forehead his x mark.____[seal]
——Roo-ka, Pounded Meat, his x mark. [seal]
De-ka-ke-up-se, Bird in the Neck, his x mark [seal]
Me-na-che, The Swan, his x mark. [seal]

Attest:

George B. Willis, phonographer.
John D. Howland.
Alex. Gardner.
David Knox.
Chas. Freeman.
Jas. C. O'Connor.

APPENDIX F

General Allotment Act of Feb. 8, 1887, 24 Stat. 388.

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in

such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further,* That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. that all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the

Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Com-

missioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And, provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the

opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That its patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at

three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall

have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this

act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

APPENDIX G

ACT OF JUNE 4, 1920

CHAP. 224. — An Act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he hereby is, authorized and directed to cause to be allotted the surveyed lands and such unsurveyed lands as the commission hereinafter provided for may find to be suitable for allotment, within the Crow Indian Reservation in Montana (not including the Big Horn and Pryor Mountains, the boundaries whereof to be determined by said commission with the approval of the Secretary of the Interior) and not herein reserved as hereinafter provided, among the members of the Crow Tribe, as follows namely, one hundred and sixty acres to the heirs of every enrolled member, entitled to allotment, who died unalloted after December 31, 1905, and before the passage of this Act; next, one hundred and sixty acres to every allotted member living at the date of the passage of this Act, who may then be the head of a family and has not received allotment as such head of a family; and thereafter to prorate the remaining unallotted allotable lands and allot them so that every enrolled member living on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allotable tribal lands for his total allotment of land of the Crow Tribe. Allotments made hereunder shall vest title in the allottee subject only to existing tribal leases, which leases in no event shall be

renewed or extended by the Secretary of the Interior after the passage of this Act, and shall as hereinafter provided be evidenced by patents in fee to competent Indians, except as to homesteads as hereinafter provided, but by trust patent to minors and incompetent Indians, the force and legal effect of the trust patents to be as is prescribed by the General Allotment Act of February 8, 1887 (Twenty-fourth Statutes, page 388). Priority of selection, up to three hundred and twenty acres, is hereby given to the members of the tribe who have as yet received no allotment on the Crow Reservation, and thereafter all members enrolled for allotment hereunder shall in all respects be entitled to equal rights and privileges, as far as possible, in regard to the time, manner, and amount of their respective selections: *Provided*, That Crow Indians who are found to be competent may elect, in writing, to have their allotments, except as herein provided, patented to them in fee. Otherwise trust patents shall be issued to them. No patent in fee shall be issued for homestead lands of a husband unless the wife joins in the application, who shall be examined separately and apart from her husband and a certificate of the officer taking her acknowledgment shall fully set forth compliance with this requirement.

SEC. 2. No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such conveyance, would become the owner of more than one thousand two hundred and eighty acres of

agricultural or one thousand nine hundred and twenty acres of grazing land within said reservation. Any conveyance by any such Indian made either directly or indirectly to any such person, company, or corporation of any land within said reservation as the same now exists, whether held by trust patent or by patent in fee shall be void and grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment.

The classification of the lands of such reservation for the purpose of allotment and the allotment thereof shall be made as provided in the Act of Congress approved June 25, 1910 (Thirty-sixth Statutes at Large, page 859), which classification with any heretofore made by authority of law as to lands heretofore allotted shall be conclusive, for the purposes of this section, as to the character of the land involved.

SEC. 3. That the Secretary of the Interior shall, as speedily as possible, after the passage of this Act, prepare a complete roll of the members of the Crow Tribe who died unallotted after December 31, 1905, and before the passage of this Act; also a complete roll of the allotted members of the Crow Tribe who six months after the date hereof are living and are heads of families but have not received full allotments as such; also, a complete roll of the unallotted members of the tribe living six months after the approval of this Act who are entitled to allotments. Such rolls when completed shall be deemed the final allotment rolls of the Crow Tribe, on which allotment of all tribal lands and distribution of all tribal funds existing at said date shall be made. The rolls shall show the English, as well as the Indian, name

of the allottee; the age, if living; the sex, whether declared competent or incompetent; the description or descriptions of the allotments; and any other fact deemed by the Secretary of the Interior necessary or proper. Said rolls shall be completed within one year after the approval of this Act, and allotments shall be completed within one year and six months from the date of the approval of this Act.

SEC. 4. That any names found to be on the tribal rolls fraudulently, may, at any time within one year from the passage of this Act, be stricken therefrom by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, after giving all parties in interest a full opportunity to be heard in regard thereto; and any allotment made to such fraudulent allottee shall be canceled and shall then be subject to disposition under the provision of this Act: *Provided,* That nothing herein contained shall be construed to deprive any such persons of the protection in the premises provided under existing law.

SEC. 5. That such of the unallotted lands as are now used for agency, school, cemetery, or religious purposes shall remain reserved from allotment so long as such agency, school, cemetery, or religious institutions, respectively, are maintained for the benefit of the tribe: *Provided,* That the Secretary of the Interior, upon the request of the tribal council, is hereby authorized and directed to cause to be issued a patent in fee to the duly authorized missionary board or other proper authority of any religious organization heretofore engaged in mission or school work on the reservation for such lands thereon as have been heretofore set aside and are now occupied by such organizations for missionary or school purposes: *Provided further.* That not more than six hun-

dred and forty acres may be reserved for administrative purposes at the Crow Agency, and six tracts of not exceeding eighty acres each, in different districts on the reservation, may be reserved for recreation grounds for the common use of the tribe, or purchased from the tribal funds if no tribal lands are available, and all such lands shall be definitely described and made a matter of record by the Indian Office.

SEC. 6. That any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may be leased for mining purposes, upon the request of the tribal council under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, but no lease shall be made for a longer period than ten years, but the lessees shall have the right to renewal thereof for a further period of ten years upon such terms and conditions as the Secretary of the Interior may prescribe: *Provided, however,* that allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe: *And provided further,* That at the expiration of fifty years from the date of approval of this Act unless otherwise ordered by Congress the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs.[1]

SEC. 7. That there is hereby appropriated the sum of $50,000, or so much thereof as may be necessary,

[1] 51 L. O. D., 96.

from any funds in the Treasury of the United States to the credit of the Crow Tribe of Indians not otherwise appropriated, for the purpose of making the surveys and allotments and for other expenses provided for herein.

SEC. 8. That any allotment, or part of allotment, provided for under this Act, irrigable from any irrigation system now existing or hereafter constructed by the Government on the said reservation, shall bear its pro rata share, computed on a per acre basis, of the cost of constructing such system: *Provided*, That no additional irrigation system shall be established or constructed by the Government for the irrigation of Indian lands on the Crow Reservation until the consent of the tribal council thereto has been duly obtained. All charges against allotments authorized by this section shall be reimbursed in not less than twenty annual payments, and the Secretary of the Interior may fix such operation and maintenance charges against such allotments as may be reasonable and just, to be paid as provided in rules and regulations to be prescribed by him. Unless otherwise paid, these latter charges may be paid from or made a charge upon his individual share of the tribal fund, when said fund is available for distribution; and if any allottee shall receive patent in fee to his allotment before the amount shall become and be a lien upon his allotment, of which a record shall be kept in the office of the superintendent of the reservation at the agency; and should any Indian sell any part of his allotment, with the approval of the Secretary of the Interior, the amount of such unpaid charges against the land so sold shall remain a first lien thereon, and may be enforced by the Secretary of the Interior by foreclosure as a mortgage. All expenditures for irrigation work on the

Crow Reservation, Montana, heretofore or hereafter made, are hereby declared to be reimbursable under such rules and regulations as the Secretary of the Interior may prescribe and shall constitute a lien against the land benefited, regardless of ownership, and including all lands which have heretofore been sold or patented. All patents or other instruments of conveyance hereafter issued for lands under any irrigation project on the said Crow Indian Reservation, whether to individual Indians or to purchasers of Indian land, shall recite a lien for repayment of the irrigation charges, if any, remaining unpaid at the time of the issuance of such patent or other instrument of conveyance, and such lien may be enforced or, upon payment of the delinquent charges, may be released by the Secretary of the Interior. In the case of lands under any project purchased in the bona fide belief on the part of the purchaser that by his purchase he acquired a right to have water from the system for the irrigation of the land purchased by him in the same manner as the Indian owner, the Secretary may, after notice to the Indians interested, determine the value of the land at the time of the purchase from the Indian, and give to the purchaser or his assigns credit on the charge for construction against the land to the amount of the difference between the price paid and the value as so determined, and shall withhold for the benefit of the tribe from the Indian or Indians of whom the purchase was made, an equal amount from any funds which may be due or distributable to them hereunder. Delivery of water to such land may be refused, within the discretion of the Secretary of the Interior, until all dues are paid: *Provided,* That no right to water or to the use of any irrigation ditch or other structure on said reservation shall vest until the

owner of the land to be irrigated shall comply with such rules and regulations as the Secretary of the Interior may prescribe, and he is hereby authorized to prescribe such rules and regulations as may be deemed reasonable and proper for making effective the foregoing provisions: *Provided, however,* That in no case shall any tenance charges for such irrigation privileges, or any of them, until water has been actually delivered to his allotment: *Provided further,* That the Secretary of the Interior shall cause to be made immediately, if not already made, an itemized statement showing in detail the cost of the constrruction of the several irrigation systems now existing on the Crow Indian Reservation separately, the same to be placed at the Crow Agency, and with the Government farmers of each of the districts of the reservation, for the information of the Indians affected by this section.[1]

SEC. 9. That lands within said reservation, whether allotted, un-allotted, or otherwise disposed of, shall be subject to all laws of the United States prohibiting the introduction of intoxicating liquors into the Indian country until otherwise provided by Congress.

SEC. 10. That any unallotted lands on the Crow Reservation chiefly valuable for the development of water power shall be reserved from allotment or other disposition hereunder, for the benefit of the Crow Tribe of Indians.

SEC. 11. That so much of article 2 of the Act of April 27, 1904, entitled "An Act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect" (Thirty-third Statutes,

[1] 8 Fed. (2), 518; 12 Fed. (2), 938.

page 353), as relates to the disposition of the trust funds of the tribe at the expriation of the fifteen-year period named in the Act, to the purchase of cattle, to the distribution of cattle among the Indians of the reservation, to the purchase of jackasses, stallions, and ewes, to the building of fences, the erection of schoolhouses and hospitals, the purchase of additional cattle or sheep, the construction of ditches, dams, and canals, and to the establishment of a trust fund for the benefit of the Crow Indians thereunder, be, and the same is hereby, repealed, effective from and after June 30, 1920: *Provided,* That all unexpended balances of trust funds arising under said agreement shall thereupon be consolidated into one fund to the credit of the tribe, the same to bear interest at the rate of 4 per centum per annum: *Provided further,* That there shall be reserved and set aside from such consolidated fund, or any other funds to the credit of the tribe, a sufficient sum to pay the administrative expenses of the agency for a period of five years; $100,000 for the support of the agency boarding school; $50,000 for the support of the agency hospital, and not to exceed $4,000 of this amount shall be expended in any one year for the support of said hospital; and $50,000 for a revolving fund to be used for the purchase of seed, animals, machinery, tools, implements, and other equipment for sale to individual members of the tribe, under conditions to be prescribed by the Secretary of the Interior for its repayment to the tribe on or before June 30, 1925: *Provided further,* That the expenditure of the sums so reserved are hereby specifically authorized, except those for administrative expenses of the agency, which shall be subject to annual appropriations by Congress: *Provided further,* That after said sums have been reserved and set aside,

together with a sufficient amount to pay all other expenses authorized by this Act, the balance of such consolidated fund, and all other funds to the credit of the tribe or placed to its credit thereafter, shall be distrributed per capita to the Indians entitled: *Provided further,* That the Secretary of the Interior is hereby authorized to permit competent Indians who have received patents in fee and other Indians who have demonstrated their ability to properly care for live stock to withdraw their pro rata share of cattle out of the tribal herd within one year after the approval of this Act, under such rules and regulations as the Secretary of the Interior may prescribe and on condition that said Indians shall execute a stipulation relinquishing all their right, title, and interest in said tribal herd thereafter: *Provided further,* That any Indian who has received his share of live stock in accordance with the above provision and who has also demonstrated his ability to properly care for and handle live stock may also be permitted to withdraw the pro rata shares of his wife and minor children under the same rules and regulations as applied to the live stock already issued to him and on condition that such cattle be branded with the individual brands of his wife and minor children, which shall be recorded in the names of the respective members of his family. It shall be the duty of the superintendent of the Crow Reservation to observe closely the manner in which such stock are handled and cared for, and in case of failure or neglect to properly care for the same the Secretary of the Interior is authorized to take charge of such shares and sell them for the benefit of the individual owners, to whose credit and proceeds of the sale shall be placed, or return them to the tribal herd or handle them with tribal cattle for the minor or in-

competent owners and charge a fee to cover the cost of caring for such live stock.[1]

SEC. 12. That upon the approval of this Act the Secretary of the Interior shall forthwith appoint a commission consisting of three persons to complete the enrollment of the members of the tribe as herein provided for, and to divide them into two classes, competents and incompetents, said commission to be constituted as follows: Two of said commissioners shall be enrolled members of the Crow Indian Tribe and shall be selected by a majority vote of three delegates from each of the districts on the Crow Reservation; and one commissioner shall be a representative of the Department of the Interior, to be selected by the Secretary of the Interior. Said commission shall be governed by regulations prescribed by the Secretary of the Interior, and the classification of the members of the tribe hereunder shall be subject to his approval. That within thirty days after their appointment said commissioners shall meet at some point within the Crow Indian Reservation and organize by the election of one of their personally to classify the members as above indicated. They shall be paid a salary of not to exceed $10 per day each, and necessary expenses while actually employed in the work of making this classification, exclusive of subsistence, to be approved by the Secretary of the Interior, such classification to be completed within six months from the date of organizing the commission.

SEC. 13. That every member of the Crow Tribe shall designate as a homestead six hundred and forty acres, already allotted or to be allotted hereunder, which homestead shall remain inalienable for a

[1] 4 Comp. Genl., 633.

period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee: *Provided,* That the trust period on such homestead allotments of incompent Indians may be extended in accordance with the provisions of existing law: *Provided further,* That any Crow Indian allottee may sell not to exceed three hundred and twenty acres of his homestead, upon his application in writing and with the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe: *And provided further,* That said land to be sold by said Indian allottee shall not exceed more than one-half of his irrigable nor more than one-half of his agricultural land and shall not include the improvements consisting of his home.

SEC. 14. That exchanges of allotments by and among the members of the tribe may be made under the supervision of the Secretary of the Interior with a view to enabling allottees to group their allotted lands on the Crow Reservation, but always with due regard for the value of the lands involved. And in cases where patents have already been issued for such allotments proper conveyance shall be made back to the United States by the allottee, whereupon the land shall become subject to disposition in the same manner as other lands under the provisions of this Act.

SEC. 15. That the Secretary of the Interior be, and he is hereby, authorized to sell allotted and inherited Indian land held in trust by the United States on the Crow Reservation, Montana, with the consent of the Indian allottee or the heirs, respectively, to any soldier, seaman, or marine who served under the President of the United States for ninety days during the late war against the Imperial German Government, or in any war in which the United

States was engaged with a foreign power, or in the Civil War, who will actually settle on said land, on annual payments covering a period not to exceed twenty years, as may be agreed upon under such rules, regulations, and conditions as the said Secretary of the Interior may prescribe and in accordance with the provisions of this Act.

SEC. 16. That there is hereby granted to the State of Montana for common-school purposes sections sixteen and thirty-six, within the territory described herein, or such parts of said sections as may be nonmineral or nontimbered, and for which the said State has not heretofore received indemnity lands under existing laws; and in case either of said sections or parts thereof is lost to the State by reason of allotment or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral, nontimbered lands within said reservation, not exceeding two sections in any one township. The United States shall pay the Indians for the lands so granted $5 per acre, and sufficient money is hereby apropriated out of the Treasury of the United States not otherwise appropriated to pay for said school lands granted to the said State: *Provided,* That the mineral rights in said school lands are hereby reserved for the benefit of the Crow Tribe of Indians as herein authorized: *Provided further,* That the Crow Indian children shall be permitted to attend the public schools of said State on the same condition as the children of white citizens of said State.[1]

SEC. 17. That the Secretary of the Interior (with the approval of the Crow Tribal Council) is

[1] 49 L. O. D., 377; 1 Comp. Genl., 180; 4 Comp. Genl., 633.

authorized to set aside for administrative purposes (at the Crow Agency and at Pryor subagency) such tracts for town-site purposes as in his opinion may be required for the public interests, not to exceed eighty acres at each town site, and he may cause the same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe; land he is authorized also to set apart and reserve for school, park, and other public purposes not more than ten acres in said town sites; and patents shall be issued for the lands so set apart and reserved for school, park, and other purposes to the municipality or school district legally charged with the care and custrody of lands donated for such purposes: *Provided, however,* That the present park at Crow Agency shall not be included in such town site or be subject to such disposition. The purchase price of all town lots sold in town sites shall be paid at such time as the Secretary of the Interior may direct and placed to the credit of the Crow Tribe of Indians.

SEC. 18. That the sum of $10,000, or so much thereof as may be necessary, of the tribal funds of the Crow Indians of the State of Montana, is hereby appropriated to pay the expenses of the general council, or councils, or business committee, in looking after the affairs of said tribe, including the actual and necessary expenses and the per diems paid its legislative committee when visiting Washington on tribal business at the request of the Commissioner of Indian Affairs or a committee of Congress, said sum and the actual and necessary expenses to be approved by and certified by the Secretary of the Interior, and when so approved and certified to be paid: *Provided,* That not to exceed $2,500 shall be expended in any one fiscal year.

Approved June 4, 1920.

APPENDIX H

RESOLUTION NO. 74-05

A RESOLUTION TO RESTRICT HUNTING ON THE CROW INDIAN RESERVATION BY THE ADOPTION OF AN ORDINANCE, AND FOR OTHER PURPOSES.

WHEREAS, during the past decade there has been a 28% INCREASE IN THE ENROLLMENT OF THE Crow Tribe and there has been an unprocedented rise in the prices of meat and most products, and all of these things have caused economic hardships on Crow Tribal members, and

WHEREAS, by virtue of Resolutions No. 64-20 and 67-12 passed, approved, and adopted on November 16, 1963 and September 17, 1966 by the Crow General Council, the Crow Tribe has permitted limited hunting of small game and birds and has permitted fishing on the Crow Indian Reservation, and has caused to be sold hunting and fishing licenses to non-enrolled members of the area and other people thus permitting these said people to hunt and fish within the exterior boundaries of the Crow Reservation, and

WHEREAS, there now exists a shortage of game and fish and this shortage causes an economic hardship to members of the Crow Tribe who for centuries have depended on game to supplement their diet, so

THEREFORE, BE IT RESOLVED, that to help alleviate the game and fish shortage and to help the economic condition of the Crow people that Resolutions No. 64-20 and 67-12 as passed, approved and adopted by the Crow Tribal Council on Novem-

ber 16, 1963 and September 17, 1966 are herewith rescinded, repealed, and removed from the Crow Tribal records, and

BE IT FURTHER RESOLVED, that no more hunting licenses shall be sold to non-enrolled people, and that the following Ordinance shall regulate hunting and fishing on the Crow Reservation from this day forth, and said Ordinance shall read as follows:

ORDINANCE

BE IT ORDAINED, by the Crow Tribe, meeting in a duly held and noticed Council that hunting, fishing, and trespassing within the exterior boundaries of the Crow Indian Reservation is hereby prohibited and the proper officials of the United States and the Crow Tribe of Indians are hereby directed and authorized to enforce the provisions of this ordinance and any Federal Statute which would prohibit such hunting and fishing and trespassing, provided, however, that the provisions of this ordinance shall not apply to members of the Crow Tribe of Indians.

BE IT FUTHER RESOLVED, that the Crow Tribal Council this 13th day of October, 1973 by unanimous votes for passage and adoption and no votes against passage and adoption.

ATTEST:

DAVID J. STEWART, Civilian
Crow Tribal Council

GEORGE A. LaVERDERE,
ACTG. Superindent
Crow Indian Reservation

FREDERICK V. LEFTHAND, SECRETARY
Crow Tribal Council

APPENDIX I

DEFENDANTS' CONTENTIONS

1. The State of Montana owns the bed and banks of the Bighorn River. *United States v. Holt State Bank,* 270 U.S. 49 (1926); *Choctaw Nation, et al. v. Oklahoma,* 397 U.S. 620 (1970).

2. Landowners riparian to navigable waters within the exterior boundaries of the Crow Reservation own to low-water mark. *Oklahoma v. Texas,* 258 U.S. 574; *Packer v. Bird,* 137 U.S. 661, 669-670; *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U.S. 77, 88-89; *United States v. Champlin Refining Co.,* 156 F.2d 769, 773 (10th Cir., 1946), aff'd 331 U.S. 788-789 (1947).

3. Landowners riparian to non-navigable waters within the exterior boundaries of the Crow Reservation own to the middle — or thread — of the stream or lake. *Oklahoma v. Texas, supra; Brewer-Elliott Oil & Gas v. United States, supra;* and *United States v. Champlin Refining Co., supra.*

4. Hunting and fishing by non-members on fee patented lands within the exterior boundaries of the reservation are subject to the exclusive jurisdiction of the State of Montana. *United States v. Wheeler.* U.S. (1978); *Oliphant v. Suquamish Tribe,* U.S. (1978); and *Puyallup Tribe of Indians v. Washington,* U.S. (1977).

5. Fishing and hunting by non-members on tribal or Indian trust lands within the reservation are subject to concurrent jurisdiction of the State of Montana.

6. Grants of the fee to non-members effected an implicit divestiture of jurisdiction over non-members

and also effected a *pro tanto* sharing of all resources not specifically reserved, including fish and game, with the non-members.

7. Non-member, fee landowners riparian to waters within the reservation possess a riparian right of fishery. This riparian right of fishery attaches to non-tribal and non-trust land and is beyond tribal jurisdiction which, by the grant of the fee to the non-member, has been implicitly divested.

8. The resolution passed by the Crow Tribal Council on October 13, 1973, proscribing non-members from hunting, fishing, and trespassing within the exterior boundaries of the reservation is invalid because:

(a) It constitutes a taking of property without due process in violation of the Fifth Amendment to the United States Constitution; and/or

(b) It deprives non-Indians of equal protection of the law guaranteed by the Fifth Amendment to the United States Constitution; and/or

(c) It is an invalid assumption of police power; and/or

(d) It conflicts with federal law which has preempted the subject.

APPENDIX J

UNITED STATES DEPARTMENT of the INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20240

Mr. John W. Cragun
Wilkinson, Cragun and Barker Law Offices
1616 D. Street, N. W.
Washington, D.C. 20006

Dear Mr. Cragun:

Thank you for your letter of November 14, enclosing a copy of your letter of the same date to the Chairman of the Confederated Salish and Montana Tribes of the Flathead Reservation, expressing your opinion as to the extent of application of the so-called hunting and fishing trespass law, 18 U. S. C. 1165.

Any question that the Superintendent of the Flathead Agency may have concerning the application of the law probably has been submitted to the Billings Area Office. None have been presented here.

The statute in question makes it an offense for anyone, without lawful authority, willfully and knowingly to go upon tribal, trust or restricted Indian land, or upon lands of the United States that are reserved for Indian use, to hunt, trap or fish. Your opinion expresses the view that the Flathead Indians, under the treaty of July 16, 1855 (12 Stat. 575), have the exclusive right of hunting and fishing on all land within the exterior boundaries of the Flathead Reservation, including fee-patented lands. Your opinion reaches the conclusion that this ex-

clusive right in fee-patented land constitutes such land as "lands of the United States that are reserved for Indian use" so that the provisions of 18 U. S. C. 1165 are applicable.

The original legislative proposal that led to the enactment of 18 U. S. C. 1165 use R. R. 7240 in the 85th Congress. It proposed to amend Sec. 1865 of Title 18, entitled "Trespass on national forest lands," by adding a provision to cover land owned by a tribe or group of Indians, as well as individual Indian allotments, in a trust or restricted status. After the report of the Department of the Interior on H. R. 7240 (See House Report No. 2593, 85th Congress, 2d Session.), an amendment was proposed in the Subcommittee of the House Committee on the Judiciary to amend the bill so that it would add a new section to Title 18, as follows:

> "Whoever, without lawful authority or permission, goes upon *Indian country as defined in Sec.* 1151 of this title, for the purpose of hunting, trapping, or fishing, or for the removal of game peltries, or fish, shall be fined not more than $500 or imprisoned not more than six months, or both, and all traps, guns, ammunition, fishing tackle and equipment, game, fish, and peltries in his possession, may be declared forfeited."
> (Underscoring supplied).

The proposal was submitted to the Department of the Interior for comment. There is enclosed a copy of the letter to the Committee, dated May 23, 1958, from the Assistant Secretary of the Interior. This letter calls attention to the fact that the use of the phrase "Indian Country" as defined in 18 U. S. C. 1151 would result in a contention that the law was

intended to apply to non-Indian land within a reservation. The Department strongly recommended against the use of such language and pointed out that the previous report on the bill had been coached in such language as to avoid any argument that it would apply to non-Indian land. The report of the Committee apparently agreed with the Department's position and accordingly modified the proposed amendments. See House Report No. 2593, *supra.*

In view of this legislative background, we are unable to agree with your conclusion that fee-patented land within the Flathead Reservation are "lands of the United States that are reserved for Indian use."

The application of the statute does not depend upon the existence of a tribal right by treaty to hunt or fish on particular land. Rather, it is, by its own terms, limited to trust or restricted Indian land or to land owned by the United States and reserved for Indian use. If the Congress had intended the statute to apply to land other than trust or restricted Indian land or to land owned by the United States and reserved for Indian use within a reservation, it could have assured such application without question by simply making the statute, as was once proposed, applicable to "Indian country" as defined in 18 U. S. C. 1151. In view of the legislative history of the statute, we are unable to agree with your conclusion in this regard.

Sincerely yours,

John D. Crow
Commissioner

Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

No. 79 1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Respondents

V.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTEAD, EARL L. SHERRON JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,

Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Certiorari Filed January 21, 1980
Certiorari Granted April 14, 1980

JOINT APPENDIX
VOLUME I

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February 25, 1976—Order Granting Big Horn County Rod and Gun Club and Citizens' Rights Organizations Intervention.

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June 20, 1978—Motion to Amend by Plaintiff Crow Tribe.

June 20, 1978—Pre-Trial Order.

June 20, 1978—Plaintiff's Motion to Amend Complaint.

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June 21, 1978—Trial Brief of Crow Tribe.

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August 1, 1978—Plaintiff's Motion for Stay.

August 1, 1978—Judgment.

August 1, 1978—Order Staying Judgment for 30 days.

August 2, 1978—Notice of Appeal by Crow Tribe.

August 14, 1978—Notice of Appeal by Plaintiff.

June 12, 1979—Opinion of Court of Appeals.

September 20, 1979—Denial of Rehearing and Modification of Opinion.

October 25, 1979—Judgment of Court of Appeals.

UNITED STATES' RESPONSE TO DEFENDANTS' FIRST COMBINED INTERROGATORIES, REQUESTS FOR PRODUCTION, AND REQUESTS FOR ADMISSIONS

(Record or Appeal, pp. 609, 612, 613, 615, 616, 620, 621 & 622)

* * *

21. Do you deny that that portion of Article II of the Treaty of May 7, 1868, 15 Stat. 649, quoted in paragraph 11 of the second cause of action has been abrogated in light of the geographical diminishment of the Crow Indian Reservation since 1868 and the intrustion, incursions and settlement of over 31 percent of the land area within the claimed present exterior boundaries of the Crow Indian Reservation by non-Indians? Answer: Yes, the United States contends that the Crow Tribe and the Congress must consent to any entry upon the reservation.

* * *

28. Do you have any documents, correspondence, memoranda, legal opinions (prepared by others than your counsel in this case), any opinions by attorneys general, any opinions by counsel or solicitors representing the Department of Interior, the Bureau of Indian Affairs, the Department of War, or any of their predecessors with regard to the ownership of any of the following:

(a) The bed and banks of the Big Horn River;

(b) The bed and banks of other streams and rivers within the exterior boundaries of the Crow Indian Reservation or within the boundaries of the original Crow Indian-claimed lands;

(c) Riparian rights owned or possessed by owners of land bordering on any portion of the Big Horn River or other rivers within the Crow

Indian Reservation or what were formerly claimed as Crow-claimed lands;

(d) Ownership of water rights within the Crow Indian Reservation by Indians or non-Indians;

(e) Water rights in the Big Horn River by Indians and/or non-Indains;

(f) Rights of navigation possessed by Indians and non-Indians and riparian owners and the general public with regard to the Big Horn River and other streams and rivers within the Crow Indian Reservation or, prior thereto, Crow tribal-claimed lands?

If so, please describe each and every such document, memorandum, or opinion so the same may be subjuect to a request for production. Consider this as a request for production of the described materials pursuant to the request set forth in the foregoing interrogatory. Answer: The United States objects to this request on the following grounds. As to subsections (a) and (b), there is no genuine dispute as to the ownership of the bed and bank of the river in light of *United States* v. *Finch* which confirmed title to the bed and bank in the United States for the benefit of the tribe. As to non-navigable streams, the United States is not claiming title to those lands and, hence, there is no issue in this case to which the interrogatory is directed. Subsections (c), (d), and (e) relate to water rights which are not in issue in this case and, hence, the request is irrelevant; the rights to the use of water of the Big Horn River are the subject of other litigation and, hence, discovery on this issue is proper only in those cases. F.R.Civ.P. 26(b)(1). Sub-section (c) is overly broad and puts an impossible burden on the United States to identify such documents. Subsection (f) is irrlevant because the United States and the tribe do not dispute that

non-Indians have the right to free navigation of the Big Horn River and, hence, there is no issue on the right of navigation on the Big Horn River in this case.

* * *

37. Do you admit that the Defendants have the right of free navigation over the waters of the Big Horn River? If not, in what way is this right restricted? State precisely and in detail the factual basis upon which you rely in stating that the Defendants do not own or possess any rights of navigation over such waters. Answer: Yes, the United States admits that the defendants have the right of free navigation within the reservation.

* * *

40. Do the Defendants, their guests, invitees, and/or licensees have the right, without the consent of the U.S. or the Crow Tribe, to moor or dock a boat on the bank of the Big Horn River in front of the property described in Defendants' first affirmative defense, paragraph 1? State precisely and in detail the factual basis upon which your answer is predicated. Answers: This issue was decided in *Confederated Tribes* v. *Namen*, and that case controls such rights.

41. In alleging ownership of the bed and banks of the Big Horn River, do you contend that the Defendants have no right to erect any kind of structure or building in front of the Defendants' property described in their answer, paragraph 1, first affirmative defense, without the consent of the U.S. or the Crow Tribe, below high-water mark of said river? State precisely and in detail the factual basis upon which you predicate your answer. Answer: See response 40.

42. Does the Plaintiff, the U.S., contend that the

U.S. and/or the Tribe can exclude all persons, who have not first obtained the consent of the U.S. or the Crow Tribe, from the use of any of the waters of the Big Horn River within the claimed boundaries of the Crow Indian Reservation? If so, state precisely and in detail the factual basis upon which you predicate your answer. If you do not so contend, state what rights the public possesses in the utilization of the waters of the Big Horn River which do not require the prior consent or license of the U.S. and/or the Crow Tribe. State the factual basis upon which you predicate either answer. Answer: See responses 33 through 41 which adequately answer the interrogatory.

* * *

ORDER

There are presently pending in the above-entitled action two motions for summary judgment. The Court having reviewed the motions, and the briefs in support of and in opposition thereto, finds they should be denied.

The outlines of the controversy herein are clear. However, summary disposition of the case would preclude an adversary trial which alone can establish a reliable foundation for determining the breadth and scope of the positions formulated by the respective parties. *Arenas v. United States,* 322 U.S. 419 (1944). Thus, summary judgment must be denied. Furthermore, the existence of matters of public importance, a factor present here, can preclude summary disposition. This is especially so when summary judgment would be used in such a manner that as much expense and effort would be incurred in establishing a case for summary judgment as would be involved in an actual trial. *See,* 6 Part 2, *Moore's*

Federal Practice, § 56.16, p. 56-661. Therefore,

IT IS ORDERED that the motion of the United States for summary judgment, and the motion of the intervenor Crow Tribe of Indians for summary judgment be, and the same hereby are, denied.

IT IS FURTHER ORDERED that the parties immediately, or no later than June 5, 1978, exchange the names and addresses of each of their witnesses and the general subject matter upon which the witness will testify, together with a list of all exhibits upon which a party intends to rely.

IT IS FURTHER ORDERED that counsel for plaintiffs convene an attorneys' conference during the week of June 12, 1978, for the purpose of completing the final pretrial order in the form prescribed.

IT IS FURTHER ORDERED that the final pretrial order be filed on or before June 19, 1978.

IT IS FURTHER ORDERED that counsel for the parties appear before the Court, in Chambers at Billings, Montana, on June 20, 1978, at 9:30 o'clock a.m., for a final pretrial conference.

IT IS FURTHER ORDERED that trial of the case commence before the Court, sitting without a jury, at 9:30 o'clock a.m. on June 27, 1978, as the first case on that day. Estimated time of trial is one day.

Done and dated this 25th day of May, 1978.

United States District Judge

ANSWERS TO COMBINED SUPPLEMENTARY INTERROGATORIES, REQUESTS FOR ADMISSIONS AND REQUESTS FOR PRODUCTION OF DOCUMENTS.

(Record on Appeal, pp. 815, 820-821, and 845)

On March 8, 1978, the Crow Tribe of Indians served and filed objections to Combined Supplementary Interrogatories, Requests for Production of Documents. The Answers thereto were withheld pursuant to further order of the Court.

* * *

13. What rights to you contend are included within the term "riparian rights" under federal common law? Please consider this as a request pursuant to F.R.Civ.P. 34 for production of any and all documents which support your answer. *ANSWER:* The case of *Namen v. Confederated Salish and Kootenai Tribes,* ____F. Supp. ____ (D. Mont.) *aff'd* ____F.2d ____ (9th Cir. 1976) controls this question to the extent of all rights, *but* hunting and fishing.

14. Do you admit that the extent of the grant to Muskrat, including all rights impliedly granted by the patent to Muskrat, is to be construed according to the law of the State of Montana? If no, state the factual basis upon which you deny this request for admission and consider this as a request pursuant to F.R.Civ.P. 34 for any and all documents supporting your answer. *ANSWER:* Denies.

* * *

17. Has the Crow Tribe been compensated for all land conveyed to the State of Montana within the original boundaries of the Crow Reservation? If not, describe that land for which compensation has not been received and state the factual basis as to why that land has not been paid for. Please consider this as a request pursuant to F.R.Civ.P. 34 for produc-

tion of any and all documents supporting your answer *ANSWER:* Yes, to the best of the Tribe's knowledge.

* * *

95. Are non-tribal members residing within the Crow Reservation permitted to participate in tribal government, vote in tribal elections, and hold tribal office? If so, state each category and the factual basis which supports your answer. *ANSWER:* No.

PRETRIAL ORDER

I.

STATEMENT OF JURISDICTION

Jurisdiction is invoked under the provision of 28 U.S.C. 1345, which provides that the federal district

courts shall have jurisdiction of all civil actions commenced by the United States. Crow Tribe 28 U.S.C. 1362 — Jurisdiction.

II.

AGREED FACTS

The Crow Tribe of Indians is an Indian Tribe with a constitution and governing body duly recognized

by the Secretary of the Interior. The United States and the Crow Tribe first treated together by a Treaty of August 4, 1825, 7 Stat. 266. This treaty was a treaty of peace and friendship.

By the Treaty of Fort Laramie, September 17, 1851, 11 Stat. 749, the United States first acknowledged the territory of the Crow Tribe. The United States recognized in Article V of that treaty that the Crow Tribe occupied approximately 38½ million acres located in Montana and Wyoming.

On May 7, 1868, the United States and the Crow Nation entered into the second Treaty of Fort Laramie, 15 Stat. 649. This treaty granted the Crows a reservation of 8 million acres located entirely in the territory of Montana.

Congress reduced the reservation by a series of four acts: 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); and 50 Stat. 884 (1937). The reservation today comprises 2.3 million acres. Thirty-one percent of that acreage, or approximately 700,000 acres, is presently owned by non-Indians.

The portion of the bed of the Big Horn River as described in paragraph 3 of the complaint of the United States lies wholly within the exterior boundaries of the Crow Indian Reservation. The Big Horn River is navigable.

On October 13, 1973, the Crow Tribal Council passed a resolution which prohibits all persons except tribal members from hunting, fishing, and trespassing within the exterior boundaries of the reservation.

The State of Montana has in the past and continues to assert the right to exercise regulatory authority over hunting and fishing of non-Indians within the exterior boundaries of the Crow Indian

Reservation. Specific acts of the State include the announcement of the opening or closing of hunting season to all lands within the reservation; publishing hunting maps to the public which indicate that hunting is allowed on the entire reservation for deer, bear, and mountain lion; and issuing hunting and fishing licenses which purport to allow non-Indians to hunt and fish within the exterior boundaries of the Crow Indian Reservation.

The State owns certain lands that are riparian to the Big Horn River. The State is a successor in interest to an Indian allottee. The state is a purchaser of land included within an allottment to an Indian allottee. A description of a portion of lands owned by the State riparian to the Big Horn River are described in the patents attached hereto as Exhibits "A" and "B". These lands were acquired by the state to provide the public with fishing access to the Big Horn River.

III.

CONTENTIONS OF THE UNITED STATES

1. The United States holds the bed and banks of the Big Horn River in trust for the Crow Tribe of Indians.

2. The Crow Tribe and the United States have the sole authority to regulate hunting and fishing on the Crow Indian Reservation.

3. The Crow Tribe of Indians has an exclusive treaty right to hunt and fish on the Crow Reservation.

4. The State of Montana has no authority to regulate hunting and fishing by members or non-members on the Crow Indian Reservation.

5. The treaty right of hunting and fishing possessed by the Crow Tribe is a tribal, not individual, right, and therefore there was no "allottment" of the treaty right to hunt and fish to members of the tribe, and no implicit conveyance of that right when fee patents were issued.

6. A riparian right of fishing does not exist.

7. If a riparian right of fishing exists, that right is still subject to regulation by the sovereign, in this case, the Crow Tribe of Indians.

The defendants will file their contentions as a separate document to be appended to this order.

IV.

STIPULATION

The parties stipulate and agree that they waive any objections as to authenticity of any documents which have been presented for inspection and copying and which have been listed as exhibits by any party.

V.

LAW PROBLEMS

The State of Montana and the intervenor defendants dispute the above contentions of the United States and therefore the law problems need not be stated separately.

VI.

EXHIBITS

The exhibit list of the United States is appended to this order. The other parties will file their exhibit lists separately.

VII.

WITNESSES

The United States will call two witnesses.

A. Barry Betts, Game Biologist, U. S. Fish and Wildlife Service, Billings, Montana, will testify concerning tribal-federal game management activities on the Crow Reservation.

B. Ron Ulrich, Fish Biologist, United States Fish and Wildlife Service, Hardin, Montana, will testify concerning tribal-federal fish management activities on the Crow Reservation.

The other parties will file their witness list separately.

DATED this 20th day of June, 1978.

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CROW TRIBES

TRIAL BRIEF

ISSUES

1. The United States holds the bed and banks of the Big Horn River in trust for the Crow Tribe of Indians.

a. Nature of the Quiet Title Action.
The Treaties, 1851 and 1868.
2. *The Statutes.*
(a) Legislative history.
3. *The Cases.*

b. Choice of Law: Federal Law.
1. The U.S. holds the Big Horn River bed in trust for the Crow Tribe to the high-water mark.

2. The Crow Tribe and the United States have sole authority to regulate hunting and fishing on the Crow Indian Reservation.

3. The Crow Tribe of Indians has an exclusive treaty right to hunt and fish on the Crow Reservation.

4. The State of Montana has no authority to regulate hunting and fishing by members or nonmembers on the Crow Reservation.

a. The effect *Oliphant* and *Wheeler* on Tribal Regulation of hunting and fishing. (Same as U.S. Brief).

5. The treaty right of hunting and fishing possessed by the Crow Tribe is a tribal, not individual, right, and therefore there was no "allotment" of the treaty right to hunt and fish to members of the tribe, and no implicit conveyance of that right when fee patents were issued.

6. A riparian right of fishing does not exist.

7. If a riparian right of fishing exist, that right is still subject to regulation by the sovereign, in this case, the Crow Tribe of Indians.

8. Indian Civil Rights Act matters.

I. THE UNITED STATES HOLDS THE BED AND BANKS OF THE BIG HORN RIVER IN TRUST FOR THE CROW TRIBE OF INDIANS.

a. *Nature of the quiet title action.*

Under the first claim for relief the United States prays for the following:

> 3. Under both treaties the Tribe reserved to itself a property right in that portion of the riverbed of the Big Horn River to the high-water mark lying east of the mid-channel from the point where the river crosses the Wyoming-Montana state line to a point where the river crosses the Wyoming-Montana state line to a point where the river crosses a true meridian line which lies 15 miles due north of the established line between Montana and Wyoming, and the entire bed of the Big Horn River to the high-water mark lying between that point where the river crosses a true meridian line which lies 15 miles due north of the established line between Montana and Wyoming and the point where the river crosses the present northern border of the Crow Indian Reservation, with the exception of that portion of the bed of the river acquired for the construction of the Yellowtail Dam and project pursuant to the Act of July 15, 1958, 72 Stat. 361, which is owned in fee by the United States. (Amended Complaint of Intervenor Crow Tribe, pages 1-2 of Averment No. 3.)

This is in the nature of a quiet title action: To quiet title to the bed of the Big Horn River in the name of the United States for the Crow Tribe of Indians.

The present controversy has not gone without judicial treatment. In 1976, the Ninth Circuit Court of Appeals ruled that the bed and banks of the Big Horn River within the exterior boundaries of the Crow Reservation were held in trust by the United States for the Crow Tribe. The *United States of America v. James Junior Finch,* 548 F.2d 822, *reversed on other grounds,* ____U.S.____(1977) (hereinafter *Finch*). In *Finch* as well as this case the essential question is as follows: Whether the United States either transferred beneficial ownership of the bed held for the Crow Tribe by the Treaties of 1851 and 1868, or retained ownership of the bed as *public lands,* which passed to the State of Montana upon admission to the Union. *Finch* p.

It is, therefore, necessary to review the applicable treaties, their negotiations, and the statutes admitting the State of Montana to the Union, and the applicable case law.

1. *The Treaties: 1851 and 1868.*

The history and negotiations of the 1851 Treaty and the 1868 Treaty were considered in detail by the Court of Claims in *Crow Tribe of Indians v. U.S.,* 284 F.2d 361 (Ct. Cl. 1960); *Crow Nation v. U.S.,* 81 CT. Cl. 238 (1935); and *Fort Berthold Indians v. U.S.,* 71 Ct. Cl. 308 (1930). The relevant historical materials from the above cases were thoroughly analyzed by the court in *Finch,* p. 829-831. Those historical materials have been submitted into evidence by the Crow Tribe. (C.T. No. 4). That analysis need not bear repeating.

However, the assurances given the Indians by the Government during the negotiations of the Treaty of

1851 are most appropriate.

> Territories at issue were referred to as "your country" and "your land" and "your territory". See *Crow Tribe of Indians v. U.S.*, 284 F.2d 361, 366-367 (Ct. Cl. 1960) quoting from an address by Treaty Commissioner Mitchell at the initial counsel of the assembly representatives of the eight Indian nations, held on September 8, 1851, reported in the ●*St. Louis Republican*, October 26, 1851. *Finch*, p. 830.

The Treaty of Fort Laramie of 1851 recognized the title of te Crow Tribe to the lands described as their in Article V of the Treaty. *Crow Tribe of Indians v. U.S., supra*, at 367. That territory pursuant to Article V reads as follows:

> The aforesaid Indian nations do agree, recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:
>
> ". . .the territory of the Crow Nation commencing at the mouth of the Powder River on the Yellowstone; then hence up the Powder River to its source; then so long the main range of the Black Hills and Wind River Mountains to the headwaters of the Yellowstone River; then down the Yellowstone River to the mouth of 20-5 Mile Yard Creek; thence to the headwaters of the Musselshell River; thence down the Musselshell River to its mouth; thence to the headwaters of Big Dry Creek, and thence to its mouth. . ."
>
> It is, however, understood that in making this recognition and acknowledgement the aforesaid Indian nations do not hereby abandon or prejudice

any rights or claims they may have to other lands; and further they do not surrender the privelege of hunting, fishing, or passing over any of the tracts of country hereinfore described.

The Second Treaty of Fort Laramie, approved in 1868, 15 Stat. 649, granted a reservation of some eight million acres, all within the 1851 reservation. Article II of the Treaty reads as follows:

the United States agrees that the following district of country, to wit:

Commencing where the 107° of longitude west of Greenwish crosses the southern boundary of Montana territory; thence north along said 107th meridian to the *mid-channel of the Yellowstone River; thence up said mid-channel* of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 54th degree of north latitude; and then east along said parallel latitude to the place of beginning, shall be, and the same as, set aprt for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly Tribes of individual Indians as from time to time they may be willing, to the consent of the United States, to admit amongst them, and the United States now solemnly agree that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservation and discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in the article for the use of said Indians, and henceforth they will, and do hereby, relinquish

all title, claims, or rights into any portion of the territory of the United States except such as embraced within the limits aforesaid."

during the negotiations of this Second Treaty, the government now acting through the Commissioner of Indian Affairs, again used language indicating that the Crows were to own the territory covered by the Treaty. *See,* footnote 13 *Finch,* quoting from *Finch,* p. 830.

"Furthermore, the terms of the 1868 Treaty themselves evidence and intent on the part of the United States to recognize that the Crow Indians were to have beneficial ownership of all lands within the exterior boundaries of the reservation."

The *Finch* Court then held:

"Both the assurance is given to the Indians during the negotiation of the Treaty of 1868, considered against the background of the Treaty of 1851, and the explicit language of the 1868 Treaty *could have had no other meaning in the "minds" of the Indians* than that the government recognized that all the lands within the metes and bounds of the reservation were to be theirs. We thus conclude that the United States, by signing the Treaty of 1868 with the Crows, intended to grant to them dominion and control over that portion of the bed of the Big Horn River situated within the reservation, subject to the retained power of the United States to exercise its paramount right to control navigation on the river." (Emphasis supplied). *Finch,* p. 830.

2. *The Statues.*

According to the Act of May 26, 1864, 13 Stat. 85, the territory of Montana was established recognizing that:

> "All treaties, laws and other engagements made by the government of the United States with the Indian tribes inhabiting the territory embraced within the provisions of this act, shall be faithfully and rigidly observed, anything containing this act to the contrary notwithstanding."

The Crows had executed the First Laramie Treaty in 1851. After the territorial Act, the Treaty of 1868 was enacted, 15 Stat. 649. In 1882, the Crow Tribe negotiated and Congress recognized another statute, Act of April 11, 1882, 22 Stat. 42.

The Enabling Act of February 22, 1889, 25 Stat. 676, by which the territory of Montana became a state, provided as follows:

> "The people inhabiting said proposed states do agree and declare that they forever disclaim all right and title . . . to all lands lying within the limits owned or held by an Indian or Indian Tribe."[1]

Pursuant to and as a pre-condition of statehood the State of Montana enacted as its Constitution the following language in Article I:

[1] Identical language is to be found in the Enabling Acts covering utah, 28 Stat. 107, 108; Oklahoma, 34 Stat. 26, New Mexico, 36 Stat. 557, 558-559, and Arizona, 36 Stat. 595.

Ordinace I.

2. The people inhabiting said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by an Indian or Indian Tribe, and that until title hereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian shall remain under the absolute jurisdiction and control of the Congress of the United States, that the lands belonging to citizens of the United States residing without the said state of Montana, shall never be taxed a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the said state of Montana on lands or property thereof belonging, or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the state of Montana from taxing these other lands or tax any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by said state of Montana so long and to such extent as such act of Congress may prescribe.

The year 1889 is significant in that not only Montana, but the states of North and South Dakota and

Washington became states under the same Enabling Act. Act of February 22, 1889, 25 Stat. 676. All those states contained significant populations of Indian people and reservations. The impact of the Enabling Statute is critical: the new states "disclaimed" control over those reservations.

a. Legislative history.

On its face no clearer statement by Congress could have been made to exclude the operative effect of state jurisdiction from Indian reservations within the new states. This clarity is also indicated from the legislative history of the Enabling Acts which resulted in the admission of North Dakota, South Dakota, Washington and Montana.

At 19 Cong. Rec. 2021 (U.S. Ex. 4(a)) the statehood bill was reported back from the committee and tables. Consequently, a companion bill concerning the dakotas alone was debated. At 19 Cong. Rec 2831-2838. (U.S. Ex. 4(b)). Section 6 of that bill appearing at page 2838 an extract from a report was read into the record.

> "Another reason for opposing the admission of Dakota (into two states) as provided for in the pending bill, is found in the fact that these are in time nine Indian reservations, the jurisdiction over which is reserved to the United States, *and* excluded from the proposed state so long as Indian Titles exist."

At page 2 of the House Report No. 1025, 50th Congress, First session (1888) (U.S. Ex. 4(f)), following is stated by the Committee on the territories.

"The convention shall also provide that the proposed States shall forever disclaim all right and title to the unappropriated public lands thereof, and to all lands lying within the limits of each state owned or held by any Indian, or any Indian Tribe, and that until the Indian titles thereto shall have been extinguished by the United States, such reservation shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under absolute jurisdiction and control of the Congress of the United States."

Further at page 10 in the committee states:

In the northern portion of Montana there are numerous Indian reservations, *the lands within which are excluded from the operation of this bill. . .*"

In face of the above legislative history it is strained to assume that the future state of Montana would have assumed to the title to the riverbed of the Big-Horn River upon admission to the Union, of any other lands lying within the Crow Reservation.

There is further legislative history. The maps following page 25 of the report show the Great Sioux Reservation as it existed at the time. There are no counties within that reservation.

Finally, the debate appearing at 20 Cong. Rec. 798, to 828 sheds further lights on the meaning of the disclaimer clause. At page 807 the disclaimer language is found at Section 4 of a substitute bill offered by Mr. Springer. Debate upon his amendment proceeded and the following comments by members appears at pp. 812 to 813.

There is another question here to which the gentleman has referred which requires special mention, and that is found in subdivision 2, of Section 4, in reference to Indian lands and Indian property. I desire to say in this connection that this constitution and the Senate bill underwent severe criticism on this point in the Senate Committee, and in the Senate itself when it was considered and discussed there. It is precisely the same provision that has been placed in the compact between the States in several instances and the United States upon their admission to the Union. There can no trouble arise out of that provision. Why, sir, our Territory has had jurisdiction over certain Indians for many years, and those Indians have suffered no hardships in consequence. The provision is the usual one.

But I want to call attention now to the peculiar provisions of this subdivision of this section. I cannot imagine where the gentleman from Illinois found them or what he drew them from. They are most extraordinary. Why, sir, under this subdivision if a man who has a single drop of Indian blood in his veins holds a section of land we can not even lay out a highway over it. We can not exercise any right of eminent domain over the land, no matter whether he has held it one year, or twenty-five years, or fifty years; and every man is held to be an Indian who has Indian blood in his veins, and there are many such in Dakota. I will read the provision:

"Second, That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof,

and to all lands lying within said limits owned or held by any Indian or Indian tribes."

We must have jurisdiction over these Indians to a certain extent.

We are perfectly willing that the United States shall exercise jurisdiction over the lands belonging to Indian Tribes, and over all public lands.

Under the Senate bill and the Constitution we will have no more jurisdiction over these matters than has the State of Michigan, Minnesota, or any other state.

We are to recognize tribal relations in connection with Indians for only a very short time longer. Our proposed State can not submit or consent to any such provisions as these.

"Except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus exempted from taxation."

The provision is all right. We have no objection to the usual provision for the protection of Indians in their property, but extraordinary provisions of the character found in this bill are unjust and ought not to be made.

Despite the protest that the disclaimer clause was "unjust" it was enacted in its unamended form.

Likewise, the delegates to the Constitutional Convention of 1889, which adopted the First Montana Constitution appreciated the "disclaimers"

meaning.[2] The concern and debates over the "disclaimer clause" of the Enabling Act was not prolific. *See* (C.T. 11a).

3. *The Cases.*

In this matter the controlling case is *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970), which held that the Choctaws and Cherokees owned the bed of the Arkansas River when it flowed through their reservations. In that case the United States had moved the Indians westward to what later became Oklahoma, and granted new reservations there. The United States promised that the new reservations would be permanently theirs, and would never be embraced within any state. The patents described the boundaries by metes and bounds, and were silent on the subject of the beds of rivers flowing through the reservations. The Court held the tribes owned the beds:

> "We do not believe the petitioners (the Indians) would have considered that they would have been precluded from exercising these basic ownership rights to the riverbed, and we think it very unlikely that the United States intended otherwise." 397 U.S. at 635.
>
> "We thus conclude that the United States intended to and did convey title to the bed of the Arkansas River . . . in the grants it made to petitioners." 397 U.S. at 635-6.

Another relevant case is *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918). In that case

[2] In 1972, Montana adopted its second Constitution.

Congress granted the Metlakatla Indians a reservation as follows:

> "That until otherwise provided by law the body of lands known as Annette Island . . . is hereby, set apart as a reservation for the use of the Metlakatla Indians. . ."

Besides the Annette Islands, the question was whether this language included the adjacent navigable waters and submerged lands to be the "body of lands known as Annette Islands." A private company had erected a fish trap (lawful under Alaska territorial laws) in navigable waters within what the Secretary of the Interior had interpreted from the statute to be the boundaries of the reservation.

Transcript Pages 92-169
Testimony of Joe Medicine Crow
DIRECT EXAMINATION

BY MR. SCHOPPERT:

Q Mr. Medicine Crow, I have quite a few questions for you. I want you to make yourself comfortable. I am going to go over a series of questions right now that deal with what lawyers call foundational questions, that deal with your background and your educational degrees and then I believe we will recess for the lunch period. I have asked the Court for this indulgence. Can you hear me all right? Would you please state your full name for the record? A Joseph Medicine Crow.

Q Where do you reside at the present time? A Lodge Grass, Montana.

Q Are you an enrolled member of the Crow Indian Tribe? A Yes, sir.

Q: Would you please state the date you were born? A: October 27, 1913.

Q: That would make you 65 years of age. Presently what is your occupation? A: I am the Executive Director of the Crow Indian Education Commission.

Q: What is the Crow Indian Education Commission? A: It was created by the Tribal Council for the purpose of running various types of educational activities, such as Headstart, Adult Education, teachers training, and many other special educational conferences and programs.

Q: And it is a part of the Crow Tribal Government structure; is that correct? A: Yes.

Q: How long have you held that particular position? A: Since June 26, 1972.

Q: Joe, decade by decade, could you please outline the periods of time you have been on the Crow Reservation. Say, from your birth for the first tenyears, did you reside on the Crow Reservation? A: Yes. I left the reservation for the first time in September, 1929, to go to a boarding school in Oklahoma. I finished the eighth grade there. Went back and finished high school. Went back and completed two years of Junior College there.

Q: Can you name that institution, please? A: Bacone College at Muskogee, Oklahoma.

Q: Then where did you reside after you got through Junior College? A: I transferred in the Fall of 1934 to Linfield College at McMinnville, Oregon, and attended college there two more years.

Q: Did you receive a degree from Linfield College? A: Yes, sir.

Q: What is your degree in? A: Bachelor of Science in Sociology and Psychology.

Q: What was the date, approximately, of that time, Joe? A: From September, 1936 to May, 1938.

Q: Then where were you located at or where did you reside? A: All of 1938 I enrolled at the University of Southern California, Los Angeles. Completed my Master's Degree June, 1939. Continued with my Doctorate Degree program for two more years until 1941. May, 1941.

Q: And your Master's Degree program was in Anthropology; is that correct? A: Yes, sir.

Q: And the two years into your Doctorate Degree, which I assume you have not received the official paper, is also in Anthropology? A: And Archaeology, yes.

Q: And Archaeology. When did you become the Crow Tribal Historian, the official Crow Tribal Historian? A: Approximately 1950 or '51. It was done through Tribal Council action at Crow Agency, Montana. It was a floor motion and adopted by the Council in session at the time.

Q: And you have been on the reservation primarily ever since you have been historian? A: Yes.

Q: Has anybody else ever held the position after you have, of official Crow Tribal Historian? A: Not to my knowledge. I am still serving in that capacity.

Q: When you refer to Crow Tribal Historian, I am referring it to our modern sense, but there are gentlemen, are there not, that keep tribal records in their head; is that correct? A: Yes, sir.

Q: And the Crows don't have a true written history, do they? A: Up until recent times the history of the Crow Tribe was kept by story tellers, keeper of records, tribal lands.

Q: Would you qualify as one of those keepers? Do you keep any of those particular stories or records? A: Since my appointment to that historian position in 1950 or '51, I have endeavored to collect all the data I could about Crow history and Crow culture

and have made notes and compiled data and I am in a position to write any segment of the tribal history.

Q: Now, you have published, have you not, some records — excuse me, you have published some introductions, prefaces and books. Can you name those books for the record, please? A. Yes. In about 1968, I think around there, that I compiled a booklet containing all the treaties of the tribe with the United States Government and all the agreements and all the various actions of Congress pertaining to the Crows up to 1959. I called it, "A Handbook of Crow Indian Treaties, Laws, and Regulations."

Also, I have written an introduction to two historical books. One was a reprint of Thomas B. Marquis' book called, "The Memories of Thomas C. Laforge, White Crow Indian," and also the introduction to a recent edition of another Thomas B. Marquis work on the Custer battle, now called, "Keep the Last Bullet For Yourself."

Also, I have contributed special documents to the United States Government, especially to the Task Force on American Indian Review Policy. And also, I have, at the present time being printed a document on the Crow Indian Buffalo jump technique to be published by the Northern Plains Anthropological Society. Also, I have another anthropological paper to be published by the University of — no, Montana State University at Bozeman, with a title, "From MM to MD, or From Medicine Man to Doctor of Medicine."

Q: I know you get sensitive or are sensitive about tribal politics, but you have reviewed a recent case of this Court, have you not, called Patrick Stands Over Bull vs. Bureau of Indian Affairs. Have you read that opinion? A: I haven't read the opinion, but I know about it.

Q: Do you know about the historical analysis of the Crow Tribal government that I showed you? A: Yes.

Q: And that was an extract — that was taken from an extract that you had prepared as a Crow Tribal report to the American Indian Policy Review Commission; is that correct? A: Yes, sir.

Q: And in all fairness, you did not prepare that document for that trial did you? A: That's right. Correct.

Q: Did you ever do work for the State of Montana in any interpretive exhibits? A: I am on the Board of Directors of the Montana Historical Society and as such, I have done some work for the Montana State Fish and Game Commission as a member of the board, Indian Board, working with the museum at Pryor, Montana, called the Plentycoups Museum.

Q: What is your — the history that you have gathered, what is your historical analysis? In your deposition you had outlined a historical anaylsis that you used to make your conclusions. Can you outline that for the Court, please? A: I use three approaches to my conclusions in writing certain aspects of the Crow history.

Number 1, I read the reports of early whitemen who had come to the Indian country, such as traders, trappers, mountain men, missionaries, civilian government people, the military people, and also, I read archaeological reports of certain excavations where migration routes of tribes have been more or less determined or studied at least, and, also, I use an oral history, oral traditions of the Crow Indian story tellers. I compare the three sources together and then I would come out with the most feasible, logical version.

Q: Okay. I want to draw your attention to your

third system of analysis. There will be a witness called by the name of Henry Hank Old Coyote. Are you satisfied in your mind that Henry would qualify as a keeper of records for the Tribe or for his family? A: Yes, sir.

Q: And to your knowledge, is Henry's versions, without going into those versions, accurate?

MR. ROTH: Object to that upon the ground and for the reasons he is asking this witness to comment upon the credibility of another witness and that is purely the province of this Court.

THE COURT: Yes. I don't think it is necessary.

MR. SCHOPPERT: I would like to recess here if I could, Your Honor. Basically I will outline just for a minute what I will attempt to accomplish after lunch.

We will go into the Crow Tribal Government history and its relations to the United States and then we will go into what the Crow Tribe perceived as the treaties and their relationship to hunting and fishing.

THE COURT: All right, we will be in recess until 1:00.

(Recess.)

AFTERNOON SESSION

MR. SCHOPPERT: Your Honor, Mr. Lynaugh would like to excuse himself from the proceedings this afternoon.

THE COURT: Yes, that is fine.

BY MR. SCHOPPERT:

Q: Continuing the questioning of Mr. Joe Medicine Crow. Mr. Medicine Crow, do you know the Crow language? A: Yes, sir.

Q: Is there a word in the Crow language for fish? A: Yes.

Q: Could you phonetically pronounce that word so the man can get it in his machine there? A: Bua-chi-la-chio. Bua means fish. Chio means to snare.

Q: Joe, is there a word in Crow for elk? A: Yes, sir.

Q: Can you say that word? A: Eechee-Ligashe.

Q: Can you write that one down for the reporter? Is there a word in Crow for trout? A: Yes, sir.

Q: Can you say that word, please? A: Bua-xaxe.

Q: Can you please write that for the reporter?

Q: Are there other words, Joe, that relate to fish, other types of fish, like a ling or a sturgeon? A: Yes.

Q: Could you write the word for ling? I think the English is l-i-n-g. A: Bua-Iia-xa-xe.

Q: Can you write that on paper, please? Is there a word in the Crow language, "To hunt"? The verb to hunt? A: Yes.

Q: Can you say that? A: Ah-shua.

Can you write that on your paper? Is there a word in the Crow language that says, "To fish"? The verb, "To fish"? A: Bua-chi-la-chio.

Q: Can you write that on your paper, please? A: That was the first one.

Q: "To fish" was the first one? A: Yes.

Q: Do "To hunt" then. I asked you the noun fish, but you gave me the verb in the first instance; is that correct? A: Okay. The noun for fish is bua. "To fish" means bau-chi-la-chio. Letter La means "To

snare fish."

Q: Has the Crow language or do the Crows distinguish between a historical Crow and a modern Crow language? Have some of the words undergone changes? A: Yes, sir.

Q: So if we were to go back, say, a hundred years, the Crows would speak a little differently than they do at the present time. Is that an accurate generalization? A: Yes.

Q: Now —

A: Language is changing.

Q: Now, these words, have they undergone any change, to your knowledge? A: Words that you have asked about?

Q: Yes, those words on the paper. A: About the same.

Q: Would you — could you tell us where the Crow Tribe or give us a general historical overview prior to 1851 where the Crows were located when they moved from various locations and whether — and what they subsisted on, whether it was fish or whether they were agriculturalists or whether they were — they lived off flesh animals? I think for a convenient starting place, let's go to the area in Canada. Can you bring us forward to the signing of the Treaty of 1851? A: Oral traditions—

MR. ROTH: Your Honor, may I insert at this particular time an objection to this line of questioning upon the grounds and for the reasons, one, improper foundation; two, perhaps hearsay; number three, lack of qualifications of the witness as to this particular subject matter; four, the sources or the data upon which he relies in forming his opinion.

THE COURT: Overruled.

BY MR. SCHOPPERT:

Q: Could you please state to your knowledge or to the oral traditions of the Tribe where the Tribe originated from? A: The ancestral tribe from which the Crow Tribe developed originated out of a so-called woods and lakes region of what is now Winnepag Lake country.

Q: What did the Crow Tribe subsist on at that present time? A: As woodland Indians, they lived on deer of the forests small animals like rabbits, muskrats, waterfowl, ducks, geese, and fish.

Q: Were there one or two or three bands of Crows involved there or was it one single unitary band of tribes? A: At that time it was one tribe. There was a tendency for a division of the Tribe.

Q: About what time did the Tribe move out of that particular area historically? A: About 1550.

Q: And where did they move to? A: Migration headed southwest. Stopped for a short time at what is now Devils Lake, North Dakota. Then reached the Missouri River.

Q: Who did they live with when they reached the Missouri River? A: They first moved in with a band of Mandan Indians.

Q: Did they stay long with the Mandans? A: Not too long. Several years.

Q: What did they subsist on when they lived with the Mandans? That was on the Missouri River; is that correct? A: Yes, sir.

Q: What did they — A: The Mandans were agriculturalists and they no doubt had corn, squash and perhaps other crops, which was supplemented with deer, antelope, small birds and small game and, of course, fish again.

Q: Did they stay long with the Mandans? A: Not

too long. Perhaps 15, 20 years.

Q: And there was another movement? A: The tribe moved about seven miles upstream to the junction of Knife River and the Missouri and established their own village of earthern lodges there.

Q: And how long did they stay in that area? A: For quite some time. But this was probably from the time they left the ancestral homes there in Winnepeg country, to the time when this second band seceded, or split, a period of about 50 years.

Q: Was there — was the reason for the split, was there an upheaval in the tribe that caused this split or migration? A: Yes. There was dissatisfaction over the division of buffalo meat, which split the tribe into two factions. The leader of one faction decided to move out westward.

Q: Where did he move to? A: He followed the Missouri River upstream and it is now believed that they went up Milk River, which the Crows in historical times called the White Bear River and settled for some time in the Lethbridge, Alberta, Canada area.

Q: Did they move from there, then, after they were in that area? A: From there they moved southwrd for a long, long time and finally came to a lake which the historians describe as so wide that they could not see the other side and so salty that they could not drink it, no doubt the Great Salt Lake.

Q: And how long did they stay in that particular area? A: A number of years, but no one knows for sure.

Q: Is that when they finally, then, moved into the present area?

MR. ROTH: Objected to as leading. Let the witness testify.

THE COURT: Sustained.

BY MR. SCHOPPERT:

Q. How long did they stay in the Salt Lake area? A: I believe 15, 20 years.

Q: And then where did they go? A: The Tribe moved eastward to a place the historians now call Where There is a Fire.

THE COURT: Where there is what?

THE WITNESS: A fire. Where There is a Fire. We do not know where this place is to this date.

Q: How long did they stay there? A: Some years. Not too long.

Q: And then where did they move? A: The Tribe moved north, northward, and eventually hit the Missouri again, probably near the present boundary line of Montana and North Dakota, about the year 1600-1700.

Q: How long did they stay there? A: Not long.

Q: And then where did they go? A: Started coming up the river. And this time they either come up the Yellowstone or followed the Missouri to the Three Forks area.

Q: Did they settle in that particular area? A: Yes, they roamed and wandered about looking for a good place to settle.

Q: And where did they finally settle, or was there a final settlement? A: In this area of Three Forks, Yellowstone Valley, Musselshell, and clear into Wyoming.

Q: When the Tribe made its last move from the North Dakota-Montana Border to its present location, were there any other tribes located here? A: Yes, sir.

Q: And which one were those? A: Shoshones were on Three Forks, Montana. Some Flathead were in the Great Falls area. And a small tribe of Kalispell further north of Great Falls.

Q: Did these tribes continue to live with the Crows or what happened? A: Shortly after the Crows arrived in this area, the Shoshones went back south into the plateau area. And some time after, some years, the Blackfeet would come down from the Canada area and chase the Flatheads and the Kalispell back over the Rocky Mountains.

Q: Now, I would like to digress for just a moment. Were there any — has your research led you to discover any what we would call prehistoric tribes in this area? That would be tribe probably before the Crow or Shoshone or Flatheads.

A: Oh, yes. Archaeologists have excavated and uncovered various prehistoric Indian camps and cites, carbon dated back to 10,000 years ago.

Q: And some of those locations are in the Yellowstone Valley at the present time? A: Yes, about five miles from here is a good location called Indian Cliffs. That dates back to 8000 years ago, probably more.

Q: When the Tribe settled in its present location, what kind of a culture classification was it? What would you refer to the Tribe as? A: At the time this new Tribe had come into this area, after 100 years of migration, that they had developed a nomadic big-game hunting tribe.

Q: Would its culture center around buffalo? A: Yes sir.

Q: Would the Crow Tribe be classified as a Pacific Northwest salmon fish culture tribe? Not at all, sir.

Q: Would that mean that the Crows would not eat fish? A: That doesn't mean that.

Q: But what would the Crows use the fish in the rivers and streams for primarily? A: They would eat fish as a supplement to their buffalo meat diet and also in times of game scarcity, they will eat fish.

Q: Has your research disclosed to you the first written indication that the Crows even referred to fish? Do you have any record to that effect? A: Yes, sir.

Q: Can you name that record? A: The report of the Council meeting near Livingston, Montana, of May, 1873, the Chief's spokesman for the Crow Tribe, Chief Sits in the Middle of the Land, known as Chief Blackfoot by white historians, mentioned fish.

Q: I will show you what has been marked Tribal Exhibit No. 74. It is a document that Mr. Medicine Crow refers to. It is an extract from the treaty negotiations, I believe, that culminated in the 1882 agreement; is that correct? A: Yes, sir.

MR. HERRON: Objected to as leading.

THE COURT: What was the number again?

MR. SCHOPPERT: 74, Your Honor.

THE COURT: I have it listed as house executive document No. 89, 43rd Congress.

MR. SCHOPPERT: that's correct.

THE COURT: Are you offering it?

MR. SCHOPPERT: Yes, I am offering that into evidence.

THE COURT: I note there is an objection. Would you state the objection?

MR. HERRON: I was objecting at that time, Your Honor to counsel's last question.

THE COURT: He is offering 74 now.

MR. ROTH: You are offering 74?

MR. SCHOPPERT: Yes.

MR. ROTH: To which the State of Montana objects upon the grounds and for the reasons it is an incomplete document. Further, that it is replete with hearsay. There does not appear to be any foundation

upon which the trustworthiness of the document or at least the statements contained in the document can be predicated. And the fact that these things were said, obviously that is a fact. Whether or not those things are true, the document doesn't speak to at all. I submit to Your Honor that without further foundation as to the authenticity of this document, that it should not be admitted.

Furthermore, I suspect that the national archives have the treaty or council minutes someplace there, and they would be the original best evidence of what was said by various parties to that Council meeting.

Now, the Tribe has — although this witness, I believe, on cross-examination or perhaps direct examination, will admit he is familiar with government archives and the manner of researching those archives, nevertheless, the base or organic document that would actually verify what was said at the Council meeting is not before Your Honor. I submit this is very, very poor, secondary evidence of what went on at that meeting?

MR. SCHOPPERT: Your Honor, I can clear this up in a minute. We gave them the primary document. Here it is in my hand. We gave that to them June 12th.

We hadn't taken Mr. Medicine Crow's deposition yet he did refer to this document. It can be completely no surprise. This is contained in this. This is what this document is, the house documents that Mr. Medicine Crow typed off of this. This is what produced this; isn't that correct, Joe?

Do you remember this document, the treaty negotition?

THE COURT: Does that change your objection?

MR. ROTH: No, I don't Your Honor. It is not the complete Council minutes.

MR. SCHOPPERT A; There are the Council minutes.

MR. ROTH: All right, then I will withdraw my objection to the — just a moment, Your Honor. Let me check this.

I will withdraw my objection that the complete Council minutes have not been available to us. But I submit the excerpt out of these particular minutes is meaningless without the entire report.

MR. SCHOPPERT: Could we move then to admit the entire report?

THE COURT: You certainly may move to do so.

MR. SCHOPPERT: We move to admit the entire report and substitute — this is Exhibit 74 instead of the extract that Mr. Medicine Crow has prepared.

MR. ROTH: No objection.

THE COURT: All right, better remark the whole document. You are withdrawing the original 74?

MR. SCHOPPERT: Withdraw the extract.

THE COURT: All right, counsel having withdrawn objection to No. 74, 74 will be received.

(Whereupon, Plaintiff's Exhibit No. 74 was received into evidence.)

MR. SCHOPPERT: May I also have leave of Court to get a Xeroxed copy of this?

I will deposit this with the clerk.

BY MR. SCHOPPERT:

Q: Joe, was Blackfoot, or Sits in the Middle, was he present at any of the treaty negotiations? A: He was at the Fort Laramie Treaty of 1869. He was the leading spokesman for the Crow Tribe.

Q: You have no doubt had the opportunity to read the Treaty of 1851, have you not? A: Yes, sir.

Q: And that treaty mentions hunting and fishing, do you remember? A: In general terms they may hunt wherever they can.

Q: And the Treaty of 1868, though, mentions hunting in unoccupied areas? A: Yes.

Q: Through the oral traditions of the Tribe, how would you define the word "hunting"? A: To hunt for food which includes large game animals, birds, and I suppose even fish, anything that is edible.

Q: After the signing of the treaties, what happened to Crow Tribal Government after that particular time, can you give us a historical sketch of what happened? A: The Treaty of 1868 required the Crow Indians to report to the newly appointed Indian Agent near Livingston, Montana, by 1870, and were to take their orders from the new agent henceforth.

Q: Around this period of time, what type of a governmental system existed for the Crows? A: Up to 1868, and even up to 1870, the chiefs were in charge of the affairs of the Tribe. There would be one main chief, chief of all bands, and then there would be ban chiefs and there would be advisors. They handled all the affairs, the government of the Tribe.

Q: Did they handle the Tribe's relationship with the Federal Government? A: Yes, sir.

Q: How long did that particular system last? A: It came to a rather abrupt end in 1870, but by 1872 they came back again into power, so to speak.

Q: How long did that last? A: That lasted until the last main chief died in 1932.

Q: 1932? Did the Crow Tribe — can you explain what the Crow Tribal delegations consisted of from the period of 1880 to 1920? A: Beginning in 1872, a delegation of Crow chieftans were authorized to go to Washington, D.C. to confer with the great white fathers. They took along some non-Indian, some

white men who had learned the Crow language and had become interpreters.

Since that time to the very present time, delegations would go directly to Washington, D.C., almost constantly.

Q: So the local agency that they dealt with was no more than an intermediary, but the delegation would go on to Washington and deal directly there. Is that a correct statement? A: The local agent had powers over routine activities, but when it comes to dealing with the Federal Government, mainly for further land concessions to the government, then these chiefs were involved.

Q: Did the Crow Tribal Council start to exist, the town hall — town hall, democracy-type of governmental system? At least not on paper but . . .
A: About 1904, probably '03, that a Senator Myers — no, Dickson, probably a Congressman Dickson, later a Senator, introduced a bill in Congress to open the Crow Indian Reservation. At that time the Crow Chiefs had gotten together, so to speak, and with the aid of young Crow Indians who had gone to off-reservation schools, had formed a task force, sort of, a council for the sole purpose of watching for these attempts to open the reservation. And I think that would be the beginning of our type of council as we know it today.

Q: So it was a response to the proposed Cession Acts after the 1904 Act; is that correct? A: Really it goes back to 1868. One of the provisions of the 1868 Treaty required that any further land concessions to the Crow Tribe would have to be approved by the majority consent of the male population of the Tribe. So that is why the Government had to deal with these chiefs constantly from 1818 to 1872, 1894, 1898, and 1904 when bills were then being introduced for acquisition of more Crow lands.

Q: How did the Crows look at the proposed bills? Did they welcome those or did they resist them? A: They resisted every attempt by the Government for further land acquisition. So naturally when Dickson's bill came up, they were absolutely opposed to it. Then the succeeding other bills of 1911, 1910 by Senator Myers, and all these other representatives from the state, including Senator Walsh himself, the Crows always opposed these attempts.

Q: Could you give some background? You have discussed the Crow Act of 1920, have you not, with some of the Crow participants in that — that participated in that legislation? A: Oh, yes.

Q: Can you name those gentlemen? A: At that time when the last attempt was made to open the Crow Reservation by Senator Walsh in 1909, the presiding Chieftans, Chief Plentycoups, Chief Medicine Crow, Chief Pretty Eagle, Chief Balance Rock, I think, and about six Chieftans.

Q: Was Medicine Crow related in any way to you? A: My grandfather.

Q: Have you ever discussed this matter with him personally? A: No. He died when I was only ten or something. Anyhow, these Chieftans enlisted the aid of some educated, young Crows who had come back from college, namely Harry Whiteman, Robert Yellowtail, Jim Carpenter and Barney Old Coyote, and went to Washington, D.C., to oppose the proposed bill to open the Crow Reservation.

Q: And what was the outcome of their opposition? A: The bill was killed there at that time. As a matter of fact, on the day the United States Government declared war on Germany, 1917, around there. So the Council meeting was to have taken place in 1917. That same date.

Q: What transpired after the defeat of that bill? A:

So Senator Walsh stated that he would no longer make any attempts —

MR. ROTH: Objected to as hearsay. Ask that the answer be stricken.

MR. SCHOPPERT: I will lay some foundation.

THE COURT: Yes.

BY MR. SCHOPPERT:

Q: On what do you base your general knowledge of this particular era, on what documents are you relying on? A: This interpreter, Robert Yellowtail, was my uncle, and I have heard that story almost constantly in his little booklet written about that particular — on that little delegation to Washington.

Q: This is the delegation that defeated the bill? A: Yes.

Q: Have you ever had an opportunity to discuss that defeat with any of those other gentlemen you named? A: Just with Mr. Yellowtail.

MR. SCHOPPERT: I think the series of questions, Your Honor, was after the defeat that Mr. Roth had objected to.

THE COURT: Yes.

MR. SCHOPPERT: I asked what happened then after —

THE COURT: That would be better rather than asking him what Senator Walsh said. What happened after that.

BY MR. SCHOPPERT:

Q: What happened after the defeat of the bill? A: The Senator then offered to help the Crow Tribe write a bill designed to administer the activities of the Crow Tribe and the Crow Reservation.

Q: I would like to jump just for a second to the Wheeler-Howard Act, because I am going to try to

tie those two Acts in.

The Crows rejected the Wheeler-Howard Act or what is now referred to as the Indian Reorganization Act; Is that not correct? A: That's correct.

Q: And what is the version in the community of the Crow Tribe as to why the government couldn't get enough votes to pass the Indian Reorganization Act?

MR. ROTH: Your Honor, I would have to object to this upon the grounds and for the reasons, surely as we get up to the year 1934 there must be some sort of substantiation of the testimony of this witness that are contained or that is contained in historical documents or documents which are contemporaneous with the times that he is speaking of and we don't have to rely on this witness's interpretation of what occurred or what the community attitude toward the legislation was, or the reasons why it was killed.

MR. SCHOPPERT: Well, Mr. Medicine Crow has written a history of the Crow Tribe that outlines this, that has been judicially noticed by this Court, and he prepared it, and in that particular version, Mr. Medicine Crow outlined why the Wheeler-Howard Act failed.

MR. ROTH: Well —

MR. SCHOPPERT: There must have been a sentiment among the people. The vote failed.

THE COURT: Of course, Mr. Roth, you have to understand as a trier of the fact, I will give whatever weight I feel is necessary based upon the objections that are made and Mr. Medicine Crow's testimony. It certainly has some value. I think I will overrule his objection, but I will keep in mind it goes to the weight rather than anything else.

MR. ROTH: Yes, Your Honor. I am not sure

whether the Federal Rules of Procedure still have the maxim incorporated in them where stronger and more persuasive evidence is available and the party relies upon weaker and less satisfactory evidence, that perhaps the presumption is anyway, maybe, the organic documents or the basic documents aren't in support of their particular position.

MR. SCHOPPERT: Your Honor, I think the Rule 803(20) of the Federal Rules of Evidence would cover this particular line of inquiry.

THE COURT: Overrule the objection.

BY MR. SCHOPPERT:

Q: Beginning then with the question, Joe, why did that Act, Indian Reorganization Act, fail to garner the votes necessary for the Crow Tribe to adopt it? A: The general people or the voting people and the leaders were quite convinced the Crow Act of 1920 was adequate for the administration of the Crow affairs; that it gave the Crow people sufficient room for self-determination; and that they had, up to that time, gained considerable experience in dealing directly with Congress and the White House. So they concluded we don't need this.

Q: The Tribe finally formalized the present council system of government in 1948; is that correct? A: Yes, sir.

Q: The Crows have no written history and you are preparing a written history for the Tribal Education Committee; is that correct? You are preparing a written history of the Tribe or you are helping to compile a written history of the Tribe? A: Not as a single volume. We do have parcels of written documents pertaining to various segments of Crow history.

Q: And one of those volumes was what Mr. Roth referred to — strike this.

Well, I had discussions with you before testifying today, did I not? A: Yes, sir.

Q: And you delivered to me a version on hunting and fishing that contained certain archival materials; is that correct? A: Yes.

Q: And had you had any conversations with me prior to, I think it would be the 28th of May? I am thinking off the top of my head. We had to have you listed as a witness by June 5th, is that not correct?

A: I think so, yes.

Q: And I talked to you the week before; is that correct? A: Yes, sir.

Q: And you at that time—

MR. ROTH: Your Honor, I hate to interrupt—

MR. SCHOPPERT: We are laying a foundation.

MR. ROTH: I am objecting to the attorney leading the witness into what occurred on certain dates. I think objective questions could elicit the same information without the editorial leadership of Mr. Schoppert.

MR. SCHOPPERT: I am trying to lay a foundation, Your Honor, as to how I acquired the national archive material.

BY MR. SCHOPPERT:

Q: How did I acquire the national archival material? You know that Bradley excerpt, how did I acquire that? A: How did we acquire it?

Q: How did I acquire it? A: Oh, I pulled out a chapter of that document and showed it to you.

Q: And you gave me a Xeroxed copy? A: Yes.

MR. ROTH: Object to leading.

BY MR. SCHOPPERT:

Q: What did you do with it? What did you with the

copy you pulled out? A: I put it back in after they were Xeroxed.

Q: Did you hand me a copy of it? A: Yes.

Q: There has been some contentions in the depositions by some of the witnesses that the Citizens Rights Organization and the Big Horn Rod and Gun Club, some of those gentlemen have never seen a Crow fish in any of the rivers or streams on the Crow Reservation. What do you have to say about that from your own personal knowledge? A: There is considerable fishing going on by the Crows over the years, but they do it rather quietly and you don't see them.

Q: Your Tribe has never, to your knowledge, required a permit to be issued to a tribal member to hunt or fish, has it? A: No, sir.

Q: Are you aware of any time, any specific instances, of when Crows fished? Do you fish? A: Yes.

Q: Does your family fish? A: My son does.

Q: Did you fish, say, when you were a young boy? A: Oh, yes, I fished all my life.

Q: Do you find anything unusual for — was it the younger people that fished or was it the older people or what age group fished primarily over the years? A: I would say all age groups. We started in when we were kids. Fished for bullheads and small fish.

Q: Do you know if anyone on the reservation since you have been alive has ever commercially fished for profit? A: No, sir.

Q: Most of the fish, then, that were caught, I suppose, were consumed for personal use? A: Yes, sir.

Q: There has been an assertion made by the state, and I draw your attention to the Government's three exhibits, 92, 93, 94, of the State of Montana, and have you had a chance to look these exhibits over

last night? They are out of the extracts of the Sanderson Report before the Court of Claims Commission. Are you familiar, Joe, with the contents of that?

A: Yes, sir.

Q: They make reference in that report, and I am paraphrasing, that the Crow Tribe participated in the slaughter of the buffalo from the period of about 1870 to 1880. Do you know or have any knowledge of that particular theory or why that was done or if it was done? A: As I recall this particular writer stated that the Indians were quite wasteful and destructive of the buffalo herds; that they would kill wantonly, and if left along, they would have exterminated the buffalo themselves within 50 years. I read that, yes.

Q: Would you say that that is wholly accurate? A: Perhaps it would be possible at a particular time when the Crows were required to kill more buffalo than they actually needed or they were accustomed to killing because of a drought the previous year where they didn't have the time or the opportunity to make new teepees, and their teepee covers have gotten old, that they want to cure new teepees. And also along the same line, their clothing, their equipment, would also become old and they would need new buffalo hides, and perhaps they had an idea that the following winter is going to be a tough one and they better get lots of meat. At a particular time they would kill more buffalos than what others might consider necessary.

Q: Have you recognized a tribal ethic in hunting game, an ethic of hunting? A: Yes. Ordinarily they would hunt and procure fish, only that amount that would sustain them for a period of time. They would regard these animals of the forest as their gift from the Great Spirit through their mother earth and they

would not exploit these gifts.

Q: What would a Crow's peer group pressure be if he wasted or laid to waste a whole string of game animals, let's say? How would the tribal members view that? A: Then or now?

Q: Both times. A: At that time hunting was well regulated by the police. One of the military clubs would be asked to police the tribe for months or even a year.

Q: Can you stop right there for a minute, Joe. To make no confusion on the record, when you mean police, you mean police in our sense of the term, but what were these — were these tribal police or bureau police? A: Tribal police.

Q: They weren't police with a badge, though, is what I am driving at. A: No. They would control hunting and they would enforce safety measures during a migration or during a caravan and they would patrol activities within the Tribe in camp. These were Indian police.

Q: Presently what would their views be? A: Presently we don't have game ordinances and we still operate on the concept that young hunters would be careful in their hunting; that they would restrain themselves. We leave it up to them.

Q: There are no doubt exceptions to that rule, though, in all fairness? A: Yes.

Q: The Crows have never — did the Crows have court systems, say around the period of 1868? How did they enforce their norms against the people? Was there a system? A: Well, the organization I referred to as the police force would obey the demands of the caravan chief, or the head man of the hunt, and also of a band chief. They controlled everything in that manner. If someone has abused their regulation or violated a hunting law, that the police people would

immediately confiscate that man's equipment, hunting equipment, his horses, or even flog him.

So justice was meted out quickly in those days.

Q: I take it, then, the Crows have traditionally been under a superintendent's court, the Bureau of Indian Affairs Court, that is really not their own? A: When the agent was assigned to the Crows in 1870, he was directly responsible to the Commissioner of Indian Affairs. Then his word was the law until 1884 when the secretary's regulations were given to him to enforce. Then again in 1903 the secretary's 1884 regulations were modified, and the Crows operated under that system until 1934 when law and order codes were revised, and we have been operating under that system until now.

Q: Are you familiar with the Bighorn River? A: Yes, sir.

Q: Are you familiar with the construction of Yellowtail Dam? A: Yes, sir.

Q: Are you familiar with the fishing in the Bighorn River prior to Yellowtail Dam? A: Yes, sir.

Q: Did Crows fish in that river? A: Yes, sir.

Q: And for what type of fish? A: Bullheads, catfish, sturgeon, pike, ling, trout, suckers.

Q: How about on some of the other streams in the reservation? A: The smaller streams like Pass Creek, Little Bighorn, Lodge Grass Creek, East Pryor Creek, Dry Head Creek, Lost Creek, Crowder Creek, all contain trout because these streams emanated out of the Big Horn Mountains and Pryor Mountains.

Q: Are you familiar with what happened to the fishery--fishing in the Bighorn after the dam was built? A: Yes.

Q: Would it be accurate to say Indians fished in

the river after the dam was built? A: Yes. Oh, yes.

Q: How about you, did you ever do that? A: Not lately.

Q: From your perusal or your research of the Crow Tribal records or documents, have you ever found an instance where the Crow Tribe authorized the State of Montana to stock game in the rivers and streams of the reservation? A: No, sir.

Q: Are you familiar with and could you relate to us how the buffalo came to be in the mountain area of the reservation? A: Yes, sir.

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Q: Are you familiar with and could you relate to us how the buffalo came to be in the mountain area of the reservation? A: Yes, sir.

Q: How did that happen? A: About 1936 or '37, shortly after Mr. Robert Yellowtail was appointed superintendent, that he started to move them to

replant the mountain area with buffalo. And he made arrangements with Yellowstone Park and bison range in South Dakota and also with the bison range in western part of the state to bring some cows and some bulls to the mountain area.

Q: Did he also about that period of time stock that area with some elk? A: Yes, they even brought some elk, too.

Q: Do you remember where they got the elk? A: Yellowstone Park.

Q: About how long, to your knowledge, have the Crows had a game warden system, of men who are tribal members who acted as game wardens? A: I would say about 1930.

Q: Do you remember what their duties were or where they patrolled basically? A: After the buffalo were brought in, they placed Chief Buffalo Rider, as he was called, there at the mountains and he had some helpers and they watched the buffalo herd more than any other game. And it was not until recent years that they started patrolling the Bighorn River.

Q: Do the Crows—did they ever utilize game birds or hunt for birds? A: Yes.

Q: Did they ever—how would they do that? A: Prior to 1930, prior to the great depression, there were many, many, many prairie chickens and sage hens on the Crow Indian Reservation, and Indian people killed these birds to supplement their diets. They depended a great deal on game birds.

Q: How about waterfowl or geese or ducks? A: Not so much as that, but they will eat ducks.

Q: Also, I draw your attention to Exhibit No. 93 from the Sanderson Report. I draw your attention to the first paragraph, and I believe it is on page 110, up in the upper right-hand corner. I have it un-

derlined in red. I quote from the article. "All the Indian tribes to the vast region—Sioux, Cheyennes, and Crows, Blackfeet, Piegans, Assiniboines, Gros Ventres and Shoshones—found their most profitable business in and greatest pleasures, next to scalping white settlers, in hunting the buffalo." Do you find anything strange about that statement? I am referring to the scalping of the white settlers. Is it proper to classify the Crows that way? A: The Crow Indians would scalp Sioux and Cheyennes, but would not scalp Caucasians because the Caucasians were not included in the winning of wars. Also, killing Caucasians was not an honor, so they desisted from that. However, the Sioux will scalp white men.

Q: Through your analysis of the oral traditions of the Tribe and also written documents, isn't it a historical fact that the Crow Tribe has been very peaceful with the United States of America? A: Yes. All throughout the early reports of traders, trappers, mountain men, that they would refer to the Crows as friend of the white man. Whenever they are in trouble with the other tribes, they would retreat to the nearest Crow camp for protection.

Q: Did the Crows go to war as such with the United States of America? A: No.

BY MR. SCHOPPERT:

MR. SCHOPPERT: One last line of questions, Your Honor.

Q: Joe, you made reference to when the Crow Tribe finally came into this particular area and settled. Were the other tribes permanent residents of this area or did they come in to raid the Crows? A: The other tribes came in much later. I would say the Crows came into this area about 1700, turn of the 18th century, and the other tribes started coming in much later, 1850, even as late as 1850.

Q: That would be the Blackfeet— A. Blackfeet came first.

Q: Flatheads possibly? A: Assiniboines, Northern Crees, Cheyennes, they came much later, at least 50, 60, 100 years later than the Crows.

Q: How about the Shoshone? A: Shoshone went back and never came back. Went back to plateau country and never been back since.

Q: So they didn't—when the Crows got here they didn't resist the Crows coming, they just left? A: No.

MR. SCHOPPERT: No further questions.

THE COURT: Any cross?

MR. ROTH: Do you want to start cross or is this a good time for recess?

THE COURT: We will take a recess about 15 minutes.

(Recess.)

MR. CARROLL: Your Honor, may I be excused from the courtroom for about five minutes? Something has just come up and I have to make a phone call.

THE COURT: Do you have any objection?

MR. ROTH: No objection, Your Honor.

CROSS-EXAMINATION

BY MR. ROTH:

Q: Mr. Medicine Crow, Mr. Schoppert has been addressing you as Joe. For brevity do you object if I also address you as Joe?

A. No, Sir.

Q: Thank you. With regard to your education, as I understand it, to sort of make a synopsis of that, you went through eight years of elementary school, graduated from a school off the reservation; is that correct? A: Seven years elementary school in Crow

Indian Reservation. One year of elementary school in Oklahoma.

Q: Then as I understand it, you then went to high school outside the reservation; is that correct? A: Yes, in Oklahoma.

Q: And then you pursued a college education at what college was that? A: First Bacone College in Muskogee, Oklahoma. Then Linfield College in the State of Oregon. And University of Southern California at Los Angeles.

Q: Approximately in 1938, was it, that you commenced working on a Master's Degree or was it 1937? A: The Fall of—no, '39.

Q: In '39 that you commenced working on the Master's Degree? A: Go back. Fall of '38. I received the degree in '39.

Q: Did you write a Master's thesis? A: Yes, sir.

Q: And that has been published, has it not? A: Not on a commercial basis, but available in public libraries.

Q: Yes, it is an academic publication, isn't that true? A: Yes.

Q: Now, subsequently as I understand it, then, you pursued your Doctor of Philosophy Degree for approximately two years. Have you recently, say, reinstituted an effort to get your Ph.D Degree? A: 'yes, sir.

Q: And I believe you worked on your Ph.D from 1939 to 1941; is that correct? A: Yes, sir.

Q: Now, Mr. Schoppert went through your knowledge of the Crow language. As I understand it, there was a word for fish which was Bua. A: Bua.

Q: A word for elk, trout, ling, and apparently a phrase which literally interpreted meant "to snare fish"; is that correct? A: Yes, sir.

Q: And the way I would pronounce that would be Bua-chi-la-chio? A: Yes, sir.

Q: Now, as I understand it, the language as far as those words of the Crow or Absarokee vocabulary existed approximately in that way for at least 100 years; is that correct? A: Yes, sir.

Q: So that words similar to those or identical to those, perhaps, existed in 1851; isn't that true? A: Yes, sir.

Q; And words existed that would be nearly identical to those in 1868; isn't that true? A: Yes, sir.

Q: Now, in addition, the Crow or Absarokee, as I guess they were known at one time, and excuse my pronunciation of that term, had a vocabulary that encompassed words like government or something similar to that, or council, did they? A: Yes.

Q: And duties and rights, were they also the subject of vocabulary words in the Crow language? A: Yes, sir.

:Q Would the word "privileges" also have its Absarokee counterpart? A: The word "privilege"?

Q: Would the word "privileges" also have its Absarokee counterpart? A: The word "privilege"?

Q : Yes. A: Yes.

Q: And isn't it true, Joe, that the Crow vocabulary distinguished between a right and a privilege? A: I think so.

Q: And those words were part of the vocabulary both in 1951 and 1868; isn't that true? A: Yes, I would say.

Q: Now, as I understand it, you have made a study both as an academic scholar and as tribal historian to review all of the laws, I guess it was, and the treaties, that dealt with the Crow Nation; is that correct? A: Yes, sir.

Q: And would you tell me when that study commenced? A: It commenced about 1938 when I went to Linfield College.

Q: And have you continued that study up to the present time? A: Yes. Yes, sir.

Q: And may I assume that early in your study you became aware of the fact that certain records were available and let's say many times only available in the government archives in Washington, D.C.? A: Yes.

Q: And may I also assume that early in your academic career, you became so sophisticated in and quite learned in the method of using the government archives as a research source? A: I DON'T KNOW WHAT YOU MEAN BY SOPHISTICATED—

Q: Experienced. A: I do my best to get the facts. Call for relevant material that I was looking for.

Q: With regard to compiling the history of laws, and particularly those that deal with hunting and fishing and the archives material that deals with hunting and fishing, when did you commence that particular search? A: About 1938, while I was still in college.

Q: And did you since 1938 acquire archive materials that deal with communications between the Superintendent of the Reservation and Commissioner of Indian Affairs?A: Yes, sir.

Q: And when did you commence to compile that information? A: About 1948.

Q: And would you have gone back to Washington, D.C., or would you have written back to the archives or some manner communicated by mail? Was it a personal visit or was it— A: At that time the old documents of the agents and superintendents were still at Crow Agency for inspection there. They were easily available.

Q: Did you make copies of the letters between the commissioner and the superintendent of letters that dealt— A: I have copies for certain years. For instance, I have copies for the year 1870, '71 and part of '72, an annual report of Agent Peas.

Q: Do you have any that go into the 1900's? A: Beginning 1931, I have available on my desk copies of letters from the superintendent, copies of letters from inspectors, copies of reports from Washington, D.C., to the field and all sorts of documents.

Q: And when you refer to your desk, are you referring to your desk which is in your office on tribal country? A: Yes.

Q :And is it a desk furnished to you in your capacity as a tribal employee? A: Yes. Tribal Historian, for Education Director.

Q: And would you tell me whether or not these letters that you are referring to and the annual reports that date back into the 1870's, if they were acquired prior to 1951? A: They were acquired in 1968, '69, in that area.

Q: So that following your resume, all of these documents were available at the inception of this lawsuit, then, were they not? A: They were available what?

Q: At the commencement of this lawsuit, all of those documents were available in your desk on tribal property? A: This particular case?

Q: Yes, since this case started. A: Yes.

Q: They were available. I see. May I also assume that your research and your gathering of material spanned the year 1913 up to the present time? Do you keep abreast of those things right up to the present time? A: The records are there. I would look at them from time to time to refresh my memory, et cetera, yes, sir.

Q: So that you basically have communications or copies of communications between, say, the Superintendent of the Reservation and the Commissioner of Indian Affairs, perhaps solicitor's letters, things of that nature, things that span the time period from the turn of the century up to the present time. Would that be a present synopsis of what you have available? A: Sufficiently, yes.

Q: Thank you. Now, you have indicated that the vocabulary of your tribe included various words that related to hunting and fishing rights and privileges. With regard to the Treaty of Fort Laramie of 1851, which you indicated you had some familiarity with, having researched it, there appears to be only one reference in that document to hunting and fishing, and that appears on the last paragraph of Article 5, and I will read it to you. "It is, however, understood that in making this recognition and acknowledgement, the aforesaid Indian Nations do not hereby abandom or prejudice any rights or claims they may have to other lands;" then there is a semicolon, "and, further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." Now, basically the salient provisions of that article could be interpreted into the Crow language. For example, the word "privileges", its counterpart in the Crow language. Hunting and fishing had their counterparts in the Crow language, did they not? A: They could be expressed properly translated.

Q: As I understand it, going back to your previous testimony, there was a difference in the Absarokee language between a "right" as opposed to a "privilege"; is that not true? A: Yes.

Q: Thank you. We then come to the treaty with the Crows dated 1868 which, again, I believe you

stated you have some familiarity with; is that correct? A: Yes, sir.

Q: And again I may be wrong, but I believe that the only reference in that treaty to hunting and fishing is contained in Article 4. And I will read it to you. "The Indians hereby named agree when the agency house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon and as long as peace subsists among the whites and Indians on the borders of the hunting districts." To your knowledge is that the only reference to hunting or fishing in the Treaty of 1868? A: Yes, sir.

Q: Now, as a result of the Treaty of 1868, as I understand it, there was some 30 million acres of land which were ceded to the United States; is that correct? A: 1851 Treaty yes, reserved 38 million acres for the use of the Crow Indians.

Q: And the Treaty of 1868 basically reserved a reservation of approximately eight million acres to the tribe; is that correct? A: Yes, sir.

Q: Which resulted basically in a cession to the United States of 30 million acres approximately; is that correct? A: A loss of about 30 million, yes, sir.

Q: Now, with regard to the land that was lost, there has been basically compensation for that in the form of a claim against the United States in compensation; is that not true? A: Yes, sir.

Q: And so far as you know, and based upon your research into tribal records, that sort of thing, all of the constituent elements of value, or all of the resources—

MR. SCHOPPORT: Object. This is beyond the scope of direct examination.

THE COURT: I haven't heard the question yet. You may continue.

BY MR. ROTH:

Q: All of the constituent elements of value and all of the resources that are connected with those 30 million acres of land basically have been paid for and passed out of the hand of the Crow; isn't that true?

MR. SCHOPPERT: I object. That calls for a legal conclusion and also is not a part of direct examination as to compensation paid by obviously Court of Claims cases.

THE COURT: Well, its is beyond the scope of the direct except he is a qualified historian and if he can answer the question of his own knowledge, I think probably he can answer it. If you know the answer.

BY MR. ROTH:

Q: Do you recall the question? A: Repeat that again, please.

Q: I say—let's go back just a bit. Have you read the records and testimony and the papers that constitute the case that the Crow Tribe filed against the United States of America to obtain additional compensation for the 30 million acres of land which they lost or was ceded to the United States as a result of the difference of land descriptions between the Treaties of 1851 and 1868? A: I would not use the word additional compensation, but initial compensation, because they were never paid between 1851 and 1868? A: I would not use the word additional compensation, but initial compensation, because they were never paid between 1851 and 1868.

As to the second part of your question, the com-

pensation was based on the historical appraisal based on a fair market value at the time of the taking in 1868, and it was not an accurate type of appraisal, historical in nature; that it did not differentiate farmland, tillable farmland, or prospective possible farmland, or future possible irrigated land. It lumped the classifications of land into one classification, open range land.

Q: May I interrupt just a moment? A: Yes, sir.

Q: From what you have indicated in your testimony, I believe responding to the question that I actually asked, which was whether or not you were familiar with those records, apparently you are familiar with those Court of Claims records; is that true? A: Appreciably so, yes.

Q: And as a result of that case, isn't it true, Joe, that the Crow Tribe was fully compensated, as far as that case is concerned, for all of the constituent elements of value that are inherent in that 30 million acres of land that passed—the total to which passed to the United States?

MR. SCHOPPERT: I will renew my objection there, your Honor.

THE COURT: Overrulled.

THE WITNESS: As I answered, there was no differentiation made of the various aspects of the value of the land, whether it is actual farmland or grazing land, but sort of a lump payment, which averaged out less than a dollar an acre, maybe 50 cents, 60 cents an acre, I have forgotten. And that was discounted for the rations that were given to the Crows. So actually we probably received compensation in monetary expression of, say, five cents an acre.

BY MR. ROTH:

Q: What I am getting at, though, is that that payment was to constitute payment for all of the constituent elements of the land, wasn't it? They were all lumped together, weren't they? A: Yes.

MR. SCHOPPERT: I object to that line of questioning, too.

BY MR. ROTH:

Q: Your answer was yes?

MR. SCHOPPERT: Your Honor, I object to that particular question as calling for a legal conclusion.

THE COURT: Again, if you don't know the answer, if you don't understand his questions, please say so. I think you understand it. We are not going to—this isn't the Court of Claims. So we are not opening up any land values. All he is asking is whether or not you know whether or not in the court case, the Court of Claims, that these were all taken into consideration.

THE WITNESS: Yes, they were compensated.

BY MR. ROTH:

Q: Thank you. Now, let's go to the Act of 1882. Now, that was a cession agreement, wasn't it? A: Yes, sir.

Q: And the Tribe agreed to that, did they not? A: Eventually, yes, sir.

Q: And as a result of that sale, again all of the constituent values of the land were ceded to the United States, weren't they? A: I would say all physical values.

Q: All right. May I ask you what the restriction to physical means? A: Minerals, trees, grassland and those elements of nature that are perceptible with the five senses.

Q: Fish and game? A: Fish and game, I suppose.

Q: With regard to that cession of land, there was no retention of political control over the land ceded, was there, by the Crow Tribe? A: Probably not.

Q: And was the next Cession Act in about 1896? A: I thought it was in the 80's. Maybe not.

Q: I am sorry. I was trying to keep track of your testimony and I am not that conversant with it.

At any rate, in regard to the next Cession Act, basically would the effect of that Cession Act be precisely the same as the effect of the 1882 Act? A: Yes.

Q: All right. Going to the Act of 1904, by which another large section of land was ceded to the United States and they were to sell it for the Indians and hold the money in trust; is that correct? A: That's correct.

Q: That is a simplification of really what was agreed to.

All right. Again, the United States obtained the consent of the Tribe, did they not? A: No. An agreement was held first and the agreement was duly signed in 1893. Then it laid dormant until 1904 when the legislation was introduced and the terms were unilaterally made by Congressmen, which completely changed the terms of the agreement.

Q: We—there was an abrogation of the treaty by the Act of 1904, wasn't there, because it was unilateral?

MR. SCHOPPERT: I object, your honor.

THE COURT: Just a minute.

MR. CARROLL: That clearly calls for a legal conclusion.

THE COURT: I think it does, also. Let's get on with the Acts, what happened.

MR. ROTH: May I pursue this witness's understanding what occurred because he did treat the subject?

THE COURT: Yes.

MR. ROTH: Thank you.

BY MR. ROTH:

Q: As far as following your testimony, Joe, and correct me if I am wrong, as I understand it, your understanding of the 1904 Act was that Congress unilaterally imposed that particular cession agreement upon the Crow; is that your interpretation of that? A: 80 percent, yes. A case in point would be, it was agreed that the Tribe would be paid $5 per acre for the million and a half acres, thereabouts, taken. However, when the bill was enacted into legislation, that portion was deleted and the government would act as a real estate agent in the selling of the lands and the income therefrom would be put into the Treasury of the United States for the use of the Crow Tribe. This is a case in point.

Q: Right. And then with regard to the Allotment Act of 1920, as I understand your testimony, there was a delegation of Crow Tribal members who actually went to Washington and supported that legislation; isn't that true? A: Yes, sir.

Q: And among the reasons that they gave to Congress for supporting that legislation was so that the surplus land which would be alloted to various tribal members as a result of that Act could be sold to non-tribal members and they could be invited onto the reservation and by such invitation, and the close association between Indian and non-Indian, the Indian would profit from it, perhaps the non-Indian would profit from it, and better relations could exist between the Indian and the non-Indian. Doesn't that sort of synopsize some of the remarks made by some

of the Indian delegation to Congress in support of the Act? A: On the contrary, sir, Section 2 of that 1920 Act prohibited the acquisition of 1280 acres of land from Indians by non-Indians, either as individuals, partnership or corporation. There is an acreage limitation of Indian lands which they may acquire.

Q: May I interrupt for just a moment? A: Yes, sir.

Q: Joe, isn't that a restriction on the amount of land that a single non-member may own as opposed to a restriction as to the total amount of allotted land that could ultimately pass into non-Indian hands? A: Individuals, corporations, partnerships.

Q: Am I not correct, Joe, in saying that an inhibition placed upon a single individual, not upon the gross acerage that could pass out of Indian hands into non-Indian hands as a result of that legislation? A: I think the ultimate idea is to preserve the reservation for Indian use as much as possible because of the Indian's keen awareness of attempts made from time after time in separating theCrow Indian from his reservation.

Q: Joe, is it true or is it not true that a Crow delegation went to Congress and supported the Crow Allotment Act of 1920? A: True and not true.

Q: And isn't it true, Joe, as a matter of fact they pleaded with Congress to give them the right to allot that land so that they would have the right individually to dispose of it basically as free men without too many government restrictions? Isn't that correct? A: The delegation was divided. Some wanted allotments, some did not want allotments.

Q: With regard to the Act of 1920, the only land that was actually reserved for tribal use was the

so-called mountain area and approximately 4000 acres and then here and there various Indian communities that had been established; is that correct? A: Much more than 4000 acres.

Q: I am sorry, 400,000 acres. A: 400,000 acres.

Q: I am sorry. A: And what they call recreation trust consisting of 40 acres located in the various districts or Indian communities, yes.

Q: Now, as a result of that Act of 1920, isn't it true, Joe, that almost all of the land, and perhaps I would be correct in saying all of the land below the take area of the Yellowtail Dam, which is riparian to the Bighorn River, has been allotted? A: You mean downstream from the dam?

Q: Yes. A: Yes, from the so-called Afterbay down is all allotted.

Q: And none of that land, riparian to the river, was reserved for purely tribal uses, was it? A: There is one tract so designated as a recreation area where the Indians had a dancehall and a racetrack and they still use that area for social activities.
How large of an acerage is that tract? A: Generally there are 40 acres for each district.

Q: Now, theoretically, isn't it true, Joe, under the Allotment Act of 1920, every single piece of land riparian to the Bighorn River below the take area of Yellowtail Dam ultimately could end up in non-Indian hands? A: Yes, theoretically.

MR. SCHOPPORT: I object to that line of questioning as theoretical and speculative.

THE COURT: Well, if they are all allotted, they can be sold. Is that what you are saying?

MR. ROTH: Yes. And the witness answered yes.

BY MR. ROTH:

Q: Now, in the Allotment Act of 1920, to your knowledge, Joe, is there any reference to fishing or hunting or reserving any hunting or fishing privileges or rights on any land allotted or which ultimately would end up in a fee simple title in a non-member? Is there anything in that legislation which addresses that question? A: Not specifically, but so long as that tract is within the exterior boundaries of the reservation, it is subject to certain restrictions involved in a trust relationship with the United States and the Tribe.

Q: Yes, I understand this is true so long as the fee is held by the United States in trust for the Tribe or for an allotted member. But not after the fee has passed into non-Indian hands; isn't that true, Joe? A: It is a general conception so long as that land is within the reservation, it is still a part of the reservation, and that we could still go hunting and fishing in that white man's land.

Q: Does that same concept say that the white man cannot hunt or fish on his own land, even though he has a fee title to it? A: I guess, although it doesn't spell it out the exact bundle of rights that the man acquires after he purchases the land, it is implied that he can hunt and fish or regulate such activities on his own fee land.

Q: Sure. And that was the concept that the Crow Tribe operated on since 1920, isn't it, Joe, that a

man who owned the fee to his land had the right to regulate its use; isn't that right? A: Yes, I guess it is implied that way.

Q: There was no government representation made to the Tribe that in any way implied anything different, was there, Joe? A: I am not familiar with that area.

Q: Let's go to the aboriginal history of the Tribe, or I should say the history of the Tribe. Being an anthropologist, Joe, what does the word "aboriginal" mean? A: It means that it is native to that particular area before any other government had appeared and wanted to take over. It was there from time immemorial.

Q: Right. Aboriginal and the phrase "it was there from time immemorial" are sort of used interchangeably, aren't they? A: Sometimes, yes.

Q: And with regard to the Crow Tribal roots, as I understand it, they commenced in the area of Winnipeg, Canada, in approximately 1550. The Tribe migrated into the Dakotas, ultimately camped along the Missouri, and about the start of the 17th century commenced a northward-westward trek that took them into, I guess, would be northwestern Canada. Then they migrated south again over to the Salt Lake area. And then ultimately at about the start of the 18th century, or 1700, they located in a semi-permanent status within the area they occupied about 1851; is that correct? A: That is true, as far as known history is concerned.

Q: Isn't is true, Joe, that the prehistoric tribes that Mr. Schoppert referred to in his examination of

you that existed in this area 8 to 10,000 years ago, that you cannot find any anthropological or archaeological link between them and the Crow Tribe of the 20th century? A: Not at this point.

Q: So that about the time that the Crow Tribe commenced migrating into this area and occupying it, it was more or less contemporaneously with the colonial period of the eastern seaboard as far as the United States is concerned; is that correct? A: Yes, probably 1550 that trek was made.

Q: Did the Crows enter into any treaties with the Indians that occupied the area or did they take it by storm? How did they divest the occupants of this abundant and fruitful area of the occupancy of the area? A: The so-called sheep eaters and some Shoshone Tribes were here. But they didn't offer too much resistance. And a band of Flatheads were on this side of the Rocky Mountains. They didn't offer much resistance. They went back over the mountains.

So this area was more or less discovered by the Crows according to the prophecy of a man who led the exodus back in 1550, and about 1600 he moved again.

Q: Isn't it true, Joe, that the Sioux used this particular area for hunting grounds prior to the time that the Crow moved into it? A: No, sir, they came much later than we did.

Q: And isn't it true that the northern tribes, such as the Flathead and the Kalispell, used it for hunting grounds before you moved into the area? A: Yes. The Flatheads and Kalispells would venture across the Rocky Mountains to the eastern slopes as hunters.

Q: In 1868, do you know what the population of the Crow Tribe was? A: I can guess. In 1843 a census taken by Chief Long Hair, which placed the population from 8 to 10,000 living and 1044 teepees. And smallpox hit the Tribe several times up to 1868. By that time I would say the population of the Crow Tribe was 4000, 5000.

Q: And at the time—in 1868, from 1850, or perhaps prior to 1850, to 1868, is when some of these other tribes were beginning to put pressures on the Crow Tribe; is that correct? A: Pressure started coming in noticeable from after the Treaty of 1851.

Q: And the Sioux was a large and powerful nation, was it not? A: Yes, mostly from the Sioux and Cheyenne we were pushed out of the Black Hills area.

Q: Did the Sioux and the Cheyenne outnumber the Crow? A: Oh, yes.

Q: Now, I believe you stated that the Crow, when they settled in this area, were of the buffalo culture; is that correct? A: By the time they settled, yes.

Q: And the buffalo basically was the center of their economy and actually played a large part in their tribal religion and rituals; isn't that true? A: Yes, sir.

Q: As a matter of fact they depended upon the buffalo for clothing and shelter and food and utensils and any number of different things; isn't that true? A: Yes, sir.

Q: And at that time game was very abundant and

particularly the buffalo was very abundant; isn't that true? A: Yes, sir.

Q: Joe, would you agree with a statement—strike that, please.

MR. ROTH: Your Honor, you have not ruled upon the admission of these documents that are offered by the United States.

THE COURT: Which?

MR. ROTH: Exhibits 5 through 28. I think you reserved objection because they withheld them from us.

MR. SCHOPPERT: I object to that.

MR. CARROLL: I did not withhold the documents.

MR. ROTH: I apologize. I withdraw the statement. I apologize for the word "withheld" particularly with reference to Mr. Carroll.

THE COURT: Just to solve the problem, the Court did over the noon hour consider the objections. I think there is probative value in the documents. Therefore, No. 5 through 27, at least at this point, will be admitted over objection.

I believe 28 was a letter dated February 6th, 1976, and I have not—I don't recall anyway, any discussion relative to that. But the other ones will be received.

(Whereupon, United States' Exhibits Nos. 5 through 27 were received into evidence.)

BY MR. ROTH:

Q: Mr. Medicine Crow, would you look over this bundle of documents just as rapidly as you can and see if you recognize those documents?

MR. SCHOPPERT: May I be excused for a few

minutes, please, Your Honor?

THE COURT: Yes.

Would it be helpful if we took a recess?

MR. ROTH: I just wondered if he had seen them.

THE WITNESS: I have seen this first one here or a letter similar to that.

BY MR. ROTH:

Q: Does it appear that the rest of that...A: Yes, these are the type of letters, documents, that transpired back and forth between Crow Agency and Washington, D.C.

Q: These are the type of documents and perhaps copies of these very documents are the ones that you compiled up to about 1968; is that correct? A: I think I would say yes.

Q: Now, Joe, would you agree with this statement that appears in a letter dated July 8, 1913, to the Commissioner of Indian Affairs, from probably—well, from Crow Agency, Montana, anyway, and I quote. "The Indians do not fish. Consequently do not suffer loss if fish are taken from the streams." A: Yes, I have seen that letter. I have forgotten which agent wrote that, but he was new and apparently never seen Indians fish. So he made that remark as was made in the 1920's.

Q: As a matter of fact, the same type of comment is contained in a letter in 1923; isn't that true? A: About, yes.

Q: Now, getting to the Wheeler-Howard Act of 1934, the Crow Tribe rejected that Act, as I understand it, until about 1948; is that correct? Is that your testimony? Or the application of the Act? A: Rejected it completely in '33.

Q: And then apparently did they ever organize under it? A: Oh, the 1948 references to the adoption

of a Constitution and By-laws.

Q: Yes. So in 1948 is the first time they, let's say, adopted their own government to the Indian Reorganization Act; is that correct? A: Not the total government; just council proceedings, quorum, et cetera.

Q: Now, in researching the history of the Crow Tribe may I assume, and in commenting about game wardens and that sort of thing, may I assume that you went back through tribal records to determine what sort of regulatory efforts they made with regard to the non-Indian on the reservation? A: The records since 1930 indicatd clearly that the Crows did not want and never allowed hunting of big game on the reservation. They always succeeded in doing that. However, fishing has been controversial back and forth, back and forth. Sometimes some tribal leaders would say, okay, let them fish. Some would say, no. So it is kind of a political football. Even the agents were involved in that.

Q: You spoke to the question, I believe, of tribal courts and a court system set up under government regulations under the B.I.A.; is that correct, or am I misstating your testimony? A: Yes, in 1934 the Federal Indian Code of Criminal Offense for Indian Court System, there is an exact title, but I have forgotten, but it was accepted by the Crows and we have operated under those codes ever since then to this time. We haven't changed it yet. We made some attempts, but we are still under that. Also, that and some Federal regulations in Title 20, in Title 18 even, where hunting in the reservation by non-Indians have been spelled out and several men have been prosecuted for hunting big game in the Big Horn Mountains, deer, elk, buffalo.

Q: To your knowledge, Joe, based upon your

research of the Crow Tribal records and the history of the Crow Tribe, to your knowledge has there ever been a non-Indian prosecuted for hunting or fishing within the original boundaries of the reservation on fee patented land? A: By the Indians?

Q: By the Indians or the United States Government.

MR. SCHOPPERT: I am going to object to this, Your Honor.

THE COURT: Just a minute.

MR. SCHOPPERT: This line of questioning—this is not really a case in controversy in this particular lawsuit, law enforcement. We posited that in our trial brief and outlined the parameters of that. We have posited in our brief that law enforcement is not really a part of this lawsuit. It is injunctive and declaratory relief to exclude from the treaty route. This line of questioning is not relevant nor is this really part of the case in controversy in this particular lawsuit. We would like to posit that objection.

THE COURT: What do you intend to prove by this?

MR. ROTH: I am not being facetious, do I really have to respond to that objection? I think it is self-evident that one of the factual issues in this case is whether or not there has been any regulations of non-member hunting and fishing activity on fee patented land within the reservation.

One of the issues in the case and one of the contentions of the Tribe is this case is they have, one, the exclusive right to control hunting and fishing under 7-05 which is an ordinance that they enacted within the reservation boundaries. One of the provisions of that ordinance proscribes all hunting and fishing by non-members within all of the reservation boun-

daries, not just non-fee land.

They purport to punish violators of that ordinance with imprisonment and fines and various other types of sanctions. I submit that when they are predicating their case upon the right to regulate under that kind of ordinance, that surely based upon Oliphant, the notions of the day, and Puwala, where the Court took cognizance of the fact that there was pervasive state control over non-Indian fishing activity within the reservation, and that non-members fished without being stopped within the reservation based upon the fact that those cases looked upon such evidence as relevant, surely with the plaintiff focusing directly upon that issue in this case in their own complaint and in their Motions for Summary Judgment, that I can inquire of this witness whether or not it was actually enforced on fee patented non-Indian land.

MR. SCHOPPERT: If I might respond for just a minute, I think Mr. Roth should read the complaint again. This is a suit against the State of Montana by the United States Government. The Crow Tribe is an intervenor. It is a civil action, not criminal action. It is trying to prevent them from doing certain acts.

THE COURT: Yes, I am aware of what the complaint says. I think I will overrule the objection, but only taking to the point if he knows. I am not going to get into speculation.

MR. ROTH: I believe the witness answered the question.

BY MR. ROTH:

Q: As a matter of fact, Mr. Medicine Crow, in your research of the subject, and your review of court records and tribal records, isn't it a fact that you could find not even a single instance of where a non-member of the Tribe was prosecuted for hunting and

fishing on fee patented land within the reservation? A: As an individual I don't recall of any.

Q: That includes right up to the present time, doesn't it? A: Yes.

Q: Do you recall this statement, Joe, and I quote. "Though the streams were infested with trout and catfish, they were left to swim in peace for fishing was a dull way of obtaining food according to the Crow." A: Yes, I recall that.

Q: Do you recall who made that statement? A: I think it was in one of my writings while in college.

Q: As a matter of fact, that is an excerpt from your thesis presented to the faculty of the Department of Anthropology, University of Southern California, May 1939, entitled, "The Effects of European Culture Context Upon The Economic, Social and Religious Life of the Crow Indian"; is that correct? A: Yes.

:Q Now, you indicated apparently that fishing is still apparently—is it a major activity of the Crow Indian or a minor activity at the present time or what is it? A: It is a routine activity.

Q: Routine activity? A: Young kids fish all the time.

Q: Where do they fish? A: Many of those streams there. Lodge Grass Creek, Little Horn.

Q: Is that on tribal land or allotted land? A: Some of it, some it allotted.

Q: But apparently not on fee patented land to non-members. A: Oh, yes, they fish any place.

Q: Would you agree with this statement which is taken from a report of February 2, 1978, authorized by project leader of the Hardin Fishery Assistance Project, "Since relatively few Crow Indians actively engage in fishing, stocking of reservation waters

has been significantly reduced"? A: I think the United States Fish and Wildlife Service routinely stock their creeks and reservoirs, but there is no report of state people doing that in recent years that I know of.

Q: I say you do agree with the statement, "since relatively few Crow Indians actively engage in fishing:" that portion of the statement made February 2, 1978. A: Yes, if you compare it with the so-called sportsmen-fishermen.

Q: With regard to the legislation or the joint resolution that led to the taking of the Yellowtail Dam site, are you familiar with that? A: Somewhat, sir.

Q: Again, with reference to that legislation, there was Indian fishing and hunting "privilege" reserved in that legislation, wasn't there, on the Bighorn or the Yellowtail Dam area? A: During the negotiations, the matter of fishing and hunting had been brought up a number of times by various members of the tribe, and—

Q: Excuse me. My question—I object to the responsiveness of the question and ask the answer to stricken because I think my question was much narrower than that.

Isn't it true that in the joint resolution in 1958, passed by Congress, which authorized the taking of the Yellowtail Dam site, that there was granted to the Indian a "privilege" to hunt and fish in the taken area without obtaining a fishing and hunting license? Isn't that true? A: I don't know about the exact wording, but that sort of an arrangement was made.

Q: Yes. At that time was the Crow Tribe represented by counsel? Did they have counsel? A: Oh, yes, I suppose.

Q: As a matter of fact, they probably had counsel

in Washington, D.C. assisting them in lobbying the legislation, didn't they? A: Probably.

Q: And it was probably the firm that is known at the present time as Wilkinson, Cragun and Barker that were your Washington Associates; isn't that correct?

MR. CARROLL: Objection, Your Honor.

THE COURT: Sustained.

MR. ROTH: Would it be appropriate to ask for a recess at this time?

THE COURT: Yes. We will be in recess for 15 minutes.

(Recess.)

MR. ROTH: Your Honor, I have used the recess to shorten my cross-examination and I announce that I have no more cross-examination at this time.

CROSS-EXAMINATION

BY MR. SEYKORA:

Q: Mr. Medicine Crow, can you hear me?
A: Yes, sir.

Q: If you can't, let me know. I have a short series of questions. We have discussed briefly, yourself and Mr. Roth, the buffalo culture. Approximately what time did that era end with the Crow Tribe? A: It ended about 1880.

Q: Just about that same time the general Allotment Act came into being and the Crow Tribe was then heading toward an agrarian type of economy; would that be a correct statement? A: Yes, sir.

Q: At that particular time and a few years thereafter, after the 1904 cession, the reservation was reduced to its present boundaries; is that correct? A: After 1904, yes.

Q: Are you familiar with the present-day boundaries? A: Yes, sir.

Q: Historically speaking within the confines of the present—what are generally known as the exterior boundaries of the reservation, were there any normal or accustomed places that members of the Crow Tribe would, on a daily and routine manner, obtain fish? A: On occasions, yes.

Q: On occasions, but not on a customary and practicing manner? A: Probably not.

Q: Now, the area, again I am speaking of the area within the exterior boundaries of the present-day reservation, are you familiar with what the native species of fish were in that area? A: About 1904, you mean?

Q: Any time, late 1880's and early 1900's. A: From stories that I have received from story tellers that there were always catfish, ling, and, of course, trout.

Q: Now, when you speak of trout, that can be refined further, can it not, to mean general native trout, or cutthroat trout? A: Yes. Cutthroat in them days.

Q: Now, the species known as the brown trout and the other known as the rainbow trout, they were not native to the area, were they? A: No, sir.

Q: How did they become abundant in the area, do you know? A: I think brown trout ate up the good trout, the native cutthroats. After they were introduced, these wonderful cutthroat native trouts disappeared faster and faster.

Q: You indicated they were introduced. They were actually planted, were they not? A: Yes, they were planted.

Q: Both species, the rainbow and the brown. That

is with regard to fishing of the exterior boundaries of the reservation.

Were there upland game birds of the Crow Indian Reservation as it now exists? A: They planted golden pheasant about 1922, '24, in the Hardin area.

Q: Could I stop you right there. Who is they? A: Oh, some people in Hardin. I think the Rod and Gun Club people.

Q: And that was the first time that the pheasant was introduced to the area, too; is that correct? A: Yes.

Q: Do you have any knowledge to the meleheris turkey, where it came from or if it exists now within the exterior boundaries of the Crow Reservation? A: They were planted about 15 years ago in the Ashland Forest area.

Q: Do you have knowledge who planted these birds? A: No, I don't.

Q: Do they exist now on the Crow Indian Reservation? A: There are some in the Wolf Mountains, Wyola area.

Q: How about the hungarian partridge, were they planted on the reservation? A: Whether they were actually planted or not, they are in there, a few of them.

Q: They are not native to the area; is that correct? A: No.

Q: Do you have any idea who planted the rainbow and brown trout and, again, I am speaking of the geographic area within the confines of the present reservation? A: I can guess

Q: I don't want you to guess. Do you know historically? A: Well, the United States Fish and Wildlife has been planting fish in there for a long, long time, and they still do it today.

Q: You don't know if they were the ones that first introduced the brown and rainbow? A: No.

Q: Mr. Medicine Crow, did you ever make the statement in regard to the law and order regulations on the Crow Reservation in regard to comparing the 1904 Regulations and the 1936 Law and Order Code, "That the unique thing about this setup is its close relationship with the state jurisdiction, concurrent rather than exclusive. This means that both the Federal or State courts have jurisdiction over the same offenses enumerated for the Indian courts. The important thing as far as the Crows are concerned is that a definite and complete legal system has been established with the court as the nucleus." Do you recognize those words? A: Yes, sir.

Q: Those words are also contained in your thesis of 1939; is that correct? A: That and probably some other writings, yes.

Q: You also had a discussion with Mr. Roth in regard to individual lands. Are you allotted, Mr. Medicine Crow? A: Yes, sir.

Q: Have you, on occasion, given non-members of the Tribe permission to hunt upon your individual allotment? A: Yes, I let them hunt pheasants. Not fish.

MR. SEYKORA: No further questions.

THE COURT: Any further questions? Any redirect?

MR. SCHOPPERT: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. SCHOPPERT:

Q: When the Tribe adopted its Constitution and By-laws in 1948, hadn't the period of time for acting under the Wheeler-Howard Act passed?

MR. ROTH: Object to that as leading the witness, Your Honor.

THE COURT: I don't know how else you would ask it.

MR. ROTH: Ask him a direct question if he knows it, first of all.

THE COURT: All right. Ask the direct question.

BY MR. SCHOPPERT:

Q: Do you know if the time had passed by 1948 to enact a constitution and by-laws under the Indian Reorganization Act? A: The Indian Reorganization Act was enacted into law in 1934 and the Crow Constitution and By-laws adopted in 1948.

Q: When you adopted the Constitution and By-laws, you weren't acting under the Indian Reorganization Act, were you? A: No, sir.

Q: Mr. Roth has brought forth a statement that you made in a Master's thesis. Can you give the Court some background on that particular statement as to why you made it? A: As to creeks teeming with fish?

Q: Yes. A: And the Indians let them be because fishing is a dull way of making a living?

Q: Yes. A: Yes, I remember making that. And I so by way of extolling the virtue of the Crow country and that they do not go into commercial fishing or depend on fishing for their livelihood.

Q: You made a statement in the taken area of the Yellowtail Dam, that the Crows were given the right to hunt and fish in that area. You made that statement to Mr. Roth, did you not? A: Yes, I recall a provision in negotiations which would allow the continued fishing and hunting by the members of the Crow Tribe within a taking area.

Q: Weren't they reserving that right?

MR. ROTH: Objected to as being contrary to the expressed language of the statute or joint resolution.

THE COURT: That will speak for itself.

MR. SCHOPPERT: I have no further questions.

THE COURT: Mr. Medicine Crow, you may step down.

Call your next witness.

MR. SCHOPPERT: Yes, Mr. Henry Hank Old Coyote, please

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TESTIMONY OF
HENRY OLD COYOTE,

DIRECT EXAMINATION

BY MR. SCHOPPERT:

Q: Will you please state your full name for the record? A: Henry Old Coyote.

Q: May I call you Hank? A: You may. Everybody else calls me that and something else, too.

Q: Where do you reside? A: At the present time I came from Ft. Smith, Montana. I have been in the employ of the Senate Select Committe on Indian Affairs, Washington, D.C.

Q: How long have you been employed by that particular committee? A: About 16 months.

Q: And you are not testifying today under the official capacity of that committee? A: I am only testifying as a member of the Crow Tribe.

Q: That was my next question. You are an enrolled member of the Crow Tribe? A: I am.

Q: And can speak Crow, I understand? A: Crow

was my first language. English language is foreign to me.

Q: And you still consider Crow to be your first language; is that correct? A: Correct.

Q: Hank, I show to you what has been marked Crow Tribal Exhibit 75. It is the exhibit we took the deposition on yesterday. A: Yes, sir. I recognize that. I didn't actually write it, but I told the story and Helen Peterson wrote it and I edited it.

Q: And you edited it. If I was — this is for foundational questions. Could you recite the story off the top of your head, if I was to ask you and if we had time here this afternoon to do such? A: Yes, I will recite it, beause I didn't read about it, I heard it from my grandfather. I also heard it from other sources, too, and I have heard it ever since I was a boy. So it was passed along to me orally and I am passing it on to the younger generation orally, too, and the story that you are referring to is referred to as Big Metal.

Q: I take it your great-grandfather was a gentleman named Old Coyote. A: Yes.

Q: Who was your father? A: My father was Barney Old Coyote, Senior.

Q: When were you born? A: I was born — shall I tell you — let's do it our society, March 14, 1914.

Q: Did you have the occasion to have this story related to you by Old Coyote? A: Yes, I was very fortunate to come in contact with him, and I was exposed to his methods of passing information on to the younger generation.

Q: Can you briefly explain for the Court how oral traditions are kept in the first place and how they are passed on? A: Usually it might be the grandfather or the grandparents, you can't limit it to the

grandfather alone, because there are times that the grandmothers will transmit a story orally to either the oldest of the boys or the oldest of the girls, so they would pass it on to the younger members of the family.

Q: But you had an older sister, is that not correct? A: Right.

Q: But you were given this particular story? A: Yes.

Q: Are you the present keeper of this story? A: You might say that because I was the recipient of certain instructions from my grandparents.

Q: About how old were you when you received this particular story from Old Coyote? A: Ever since I can remember until I was about 18 years old when my grandfather passed away.

Q: Would there have been other gentlemen of the Tribe that would have also related this story to you? A: That is correct.

Q: Can you name them? A: I have heard from Shot in the Hand, who was one of the oldest members of the Tribe at the time, pretty close to 100 years old. He had a sharp mind and he recited the story for me. Also from Iron Prong, another older member of the Tribe, as well as others that I came in contact with later on.

Q: For a minute let's place Old Coyote in history. About when was he alive? A: Well, I don't know the year that he was born, but he was alive at the time the Crows were up around the area of Livingston, Three Forks, in that area and they moved down here. And he was alive at the time of the Battle of Rosebud and Custer Battle.

Q: Was he a scout for Custer? A: He was an enlisted man under General Crooke. He was wounded at the Battle of Rosebud. So he wasn't in on General

Custer's Battle.

Q: Can you wait a minute. I will get you a drink of water.

Did you ever have the occasion to discuss either hunting or fishing with Old Coyote or any of the other elderly gentlemen you have discussed or you have mentioned? A: Yes. I wanted to know how they fished or how they obtained fish and what role fish played in the lives of the Crow Indian.

Q: What role did fishing play in the lives of the Crow Indian? A: They supplemented their supplies by having fish, or if they came to a place where there were fish, they had methods of catching them and probably some outstanding young man would probably invite some other members of the Tribe to a feast on a fish that they would catch.

Q: Did they tell you how they caught the fish, Hank?

MR. ROTH: Your Honor—

THE WITNESS: May I explain?

MR. ROTH: Excuse me, Mr. Old Coyote. I haven't interrupted before because I thought he was on foundation. He went — at any rate I do have an objection and continuing objection to the line of questioning upon the grounds and for the reasons, number one, improper foundation; two, trustworthiness not established; number three, obviously hearsay; number four, it is a story in many instances, and with regard to fishing and that sort of thing, there are historical documents now that the Court has received in evidence that do treat the subject. Apparently it isn't alien to literature and therefore, those types of sources should be utilized rather than the hearsay testimony of this witness.

MR. SCHOPPERT: May I ask Mr. Old Coyote just one question before you respond, Your Honor?

THE COURT: Certainly.

BY MR. SCHOPPERT:

Q: Hank, you have heard what Mr. Roth has stated. Is that entirely accurate, the people who have written about the Crows, have they been totally accurate? A: No.

MR. SCHOPPERT: I would like to develop this foundation a little bit more.

BY MR. SCHOPPERT:

Q: Have you not done some consulting work for the National Park Service? A: Right.

Q: Have you done some consulting work for the movie industry? A: Right.

Q: And can you name the movie industry programs that you did consulting work for? A: I was consultant for some documentary films being filmed by N.B.C. and for Paramount.

Q: Have you ever done any — have you ever given any speeches on any college campuses? A: Yes.

Q: Where? A: I have appeared as Guest Lecturer at Eastern Montana College, Montana State University, University of Montana, Northern Montana College, Northern Wyoming College, Northern Arizona College, and a few small schools.

Q: And your speeches were on aspects of Crow life, I take it? A: Correct. Plains Indian culture.

Q: Have you ever discussed Crow history with other white historians that have come through the Indian country? A: Correct.

Q: How about anthropologists? A: I have had my fill with anthropologists, barring Joe Medicine Crow.

Q: Have you ever disagreed with any of the non-Indian anthropologists that have made conclusions about the Crow Tribe? A: Correct. One of the foremost authorities in archaeology, Dr. Shumaker,

came up to Big Horn Canyon National Recreation area and I disagreed with him. I told him what he read was theories, but the story that was passed along to me compared with history, his story was inaccurate.

Q: Old Coyote and these other men that you have mentioned, they would have been alive in the 1870's would they not? A: Yes.

Q: 1880's? A: Yes.

Q: And 1890's, in that era. Under what circumstances would they relate these stories to you as a young — well, as a teenager, older teenager? A: Well, these keeper of certain information are relied upon. My grandfather was such a person, and people wanting to get information from a good source, that they always come to my grandfather.

Q: The truthfulness of Mr. Old Coyote has been attacked by the State of Montana. You were talking in deposition —

MR. ROTH: Just a minute. Excuse me, Your Honor. The honesty and the truthfulness of Mr. Old Coyote, the witness here, or any of his predecessors or ancestors, has not been attacked. That is not the truth.

The truthworthiness of a story is attacked because I believe, as Your Honor knows, myth — something starts out as an incident in some sort of tribal history, such as the earth was created in seven days, and we know that isn't a fact. There is a story in the Crow history that grew out of probably some incident, but because that story passed from word of mouth, from one generation to another, and I believe this witness is going to testify that that story has been carried on some 15 generations, or approximately 300 years, that there creeps into that story a distortion, and a myth, and a fiction, so that

no longer is the Court looking at fact, they are looking at a story. And it doesn't have any probative value or any relevancy in this case and it is on that basis that I attack the trustworthiness, certainly not the honesty of Mr. Coyote, and I resent that remark.

MR. SCHOPPERT: It does create certain areas on the Crow Reservation that have religious significance and that is precisely why this document is going to be introduced.

THE COURT: You are going to offer it?

MR. SCHOPPERT: Yes.

MR. ROTH: Could I supplement my objection with a citation?

Rule 401 in defining relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Now, I submit that a reading of a story just doesn't fulfill that particular requirement.

THE COURT: I haven't looked at the story.

MR. SCHOPPERT: Well, Your Honor, Rule 803(20) can establish Mr. Old Coyote as credible evidence as to establishing this particular story in order to establish the Crow Mountain area which would include both, I believe, the Pryor Mountains and the Big Horn Mountains, plus Big Horn Canyon, as having religious significance to the Tribe.

Now, I think the distance in the Chocteau case puts some reliance on the fact that Chocteaus did not speak about the Arkansas River in some other religious or Indian-held beliefs. I may be slightly misstating the paragraph, but I believe it is the fourth-last paragraph in the dissent, and I believe I have the opportunity to establish for the Court's use, and

of course it is a non-jury trial, the religious significance of those areas to the Crow Tribe and other areas on the reservation as having religious significance.

THE COURT: Well, to shorten up the proceedings at this point, I am going to accept this evidence on the same basis as I did the prior witness's testimony. It is part of the Crow history. I understand from my own personal life that stories change from time to time as things happen, and I am sure it happens with Mr. Old Coyote.

But it is something I believe is part of the Indian culture, and certainly might be helpful to the Court in deciding this case. And for that reason I will allow Mr. Old Coyote to testify.

MR. SCHOPPERT: Thank you, Your Honor.

BY MR. SCHOPPERT:

Q: What this means, Hank, is the story that you have had prepared for you, you related to Mrs. Peterson, will be put into evidence. That means we don't have to recite the entire story. I think the story sort of speaks for itself, and we do want to get the trial on.

I am going to ask you a few generalized questions about the Big Horn Mountain area and what some of the Crow leaders have said about that area.

Hank, have any Crow Tribal leaders, to your knowledge, ever made any statements as to the importancve of the Big Horn Mountains? A: Yes. Going back, I will refer to a statement made by Curly, one of the surviving scouts of General Custer. I saw him and knew him as a boy, and he said that in order to get to the real soil on the Big Horn Mountains or any part of the Indian country, you would have to scratch the surface to get to the real soil

because the top soil is the sweat and blood of the Crow Tribe.

Also, I heard from Chief Two Leggins as a boy. I heard him talking. He said the mountain area, as well as the Crow country, is our commissary, that is where we get our food, like roots, plants, the fruit, and the game on that land. And it is also our place of worship because we go there, the high mountains, the low places, any place on them where we go to meditate, and that results in our religious beliiefs.

That is also a cemetery where our ancestors are mixed in with the soil and it is a place to be enjoyed by our people. We have water on it, which is good, the mountain area is good. We have wildlife on there, which is good. We show our appreciation by using it, going from the known to the unknown. That is our belief.

Q: Do Crow people in 1978, and I feel embarrassed in asking this question, Hank, but I think we have to have it on the record, do Crow people still worship in the Big Horn Mountains presently? A: That is correct. There are some sites that the dominate society has called Vision Quest. That would be the wrong name for it.

Q: What would be the proper name? A: I would call it meditation sites, where people go to pray, where they want to be alone. But the tourist type have come in there and have made those places unclean by leaving their garbage there and the Indians have gone to other places, higher places.

Q: The Big Metal that you refer to in your story, is he buried by the Bighorn River? A: Yes, he is buried — at his request he was buried on the banks of the Bighorn River.

Q: Can you state the location of that? A: It is about a mile from the present post office. But we

were reluctant to tell the public about it, because the last park service had ffered to go in there and make some test holes to look for that grave. But we would be disturbing the remains of Big Metal. That is the reason we haven't told the exact location of that burial site.

Q: I don't want you to go any further on that. When we talk of the mountain areas, are we including the Pryor Mountains and the Big Horns or just the Big Horns? A: We are talking about the Pryor Mountains, too. We have some history that the gentleman over there objected to, but we have sites over there that we know the stories of. But at this point it brings to mind that the dominant society, if it is not written, they don't want to go for it. But as long as they don't get the information from the right sources, they have their own versions of it, and that is what they want to go by. And being illiterate, by not being able to speak their language, they think that person by not being able to speak their language, that they are illiterate.

Q: I want to return now to some of the questions — I think we were on a line of questioning before Mr. Roth posed his objection. We were on the line of questioning that I believe that asked about Old Coyote fishing experiences and you had related facts about fishing. Did he ever tell you what methods they used? I think that was the question I was on. A: Yes. You have the so-called sportsman. In order to be a sportsman, you have to wear a souchy hat and wear fish hooks in your hat and—

THE COURT: The question was how did they fish in those days.

THE WITNESS: Yes, I am just working on the comparison.

THE COURT: I know the comparison. Just answer the question.

THE WITNESS: Now, the Indians had their own methods. They made hooks out of bones. And they used sinew and the methods that were used, it is descriptive. The way they described fishing is snaring a fish and they used to use sinew and they used to take vines, form a little hoop, put the sinew on the side and put it on the end of the willow and snare the fish, and they usually make traps, too. They make spears out of three-pronged willows, put bones on the end of it, and tie it with sinew and use it to spear fish with.

In fact, one man used that method and he was good at it, that he formed the name and passed it on to Earl Howe, give him the name of Spear a Fish.

There is another method, it was our trade secret, but we will tell you now. Young boys used to go down along the river or any stream and look for holes under the banks and big fish usually go in there and rest and they put brush in front of that entrance, reach in there and grab the fish by the gills and throw him out just like a bear would.

BY MR. SCHOPPERT:

Q: Did you ever have the opportunity, Hank, to test any of those methods yourself when you were a young boy?

A: I tried snaring fish.

Q: Were you very successful? A: Yes. In fact one whole summer that is what we did.

Q: Did the Crows, for ceremonial purposes, ever use anything out of the bed of the Bighorn River? A: Yes.

Q: What was that? A: They find seashells, sometimes rocks. The rocks that they get they use

for sweat fath. Sometimes they would get driftwood and use it on their fires. And they find seashell. They use it for remedies for sores or any breaks in the skin or a rash.

Q: Ornaments may be the wrong term — A: Right.

Q: —but would they also use the shells for ornaments? A: A lot of people, they ususally go for these shells and use it for ornaments, but lately abalone shell has been outlawed as an indigenous species. That is the reason I didn't want to come to that. Because we may be saying something here—

Q: You use another type of shell? A: Yes.

Q: Were you present — Mr. Medicine Crow has testified — were you present when the reservation was stocked with buffalo personally? A: Yes.

Q: Can you relate that particular experience? A: Well, I knew they had a surplus herd within the park service areas and other areas. Rather than slaughter the buffalo they were looking for a place to transplant the buffalo. Robert Yellowtail, Senior, happened to be the superintendent at the Crow Agency at the time, and he applied for it and he was given the buffalo and they were transported in trucks and turned loose up into the Big Horn Mountains.

Q: How about elk, did Mr. Yellowtail also participate in an elk stocking program? A: Yes, he also applied for some elk and they turned elk into the Big Horn Mountains.

MR. SCHOPPERT: No further questions, Your Honor.

THE COURT: You are moving the admission of 75.

MR. SCHOPPERT: Yes.

THE COURT: There is objection, which has been noted, and the Court will admit it over objection.

('Whereupon, Crow Tribal Exhibit No. 75 was received in evidence.)

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. ROTH:

Q: Mr. Old Coyote, I have only a very few questions. You and I discussed basically your story during the deposition; isn't that true? A: Well, I will answer your questions as long as I understand them.

Q: Did you understand that? A: When you talk to me the language I understand, I will answer you.

Q: Do you understand me? A: Now, I do.

Q: We discussed your story that appears in Crow Tribal Exhibit No. 75 yesterday at your deposition; is that true? A: Yes, I repeated it at your request.

Q: Now,— A: I didn't know that you didn't believe it.

Q: I beg your pardon? A: I didn't know that you didn't believe it.

Q: I am not saying whether I believe it or not. A: I was trusting you.

Q: What I am going to ask you now, and I don't wish to argue with you nor do I mean to be impolite, Mr. Old Coyote, but if you would just listen to my question and refrain from interrupting until I am finished, I am sure the Court will give you a chance to answer my questions. Is that a deal?

MR. SCHOPPERT: May I approach the bench, Your Honor?

THE COURT: Yes.

(At the bench.)

MR. SCHOPPERT: I think Mr. Old Coyote is upset about the truthfulness of his grandfather. Could

we take just five minutes and could I talk to him? I think he feels that way and can I explain to him what is going to transpire?

THE COURT: Certainly.

(Open court.)

THE COURT: Take a five minute recess.

(Recess)

CROSS-EXAMINATION (Continued)

BY MR. ROTH:

Q: Mr. Old Coyote, Exhibit No. 75, which is the story which apparently was written by Helen Peterson but edited by you, I believe we went over this, basically is the same narrative that you told me at the deposition; is that true? A: Correct.

Q: Now, with regard to that story, is it not true that the event that is related in that story supposedly took place approximately 15 generations ago, or 300 years? A: When you are talking about the measure of time differing from the dominant society, whatever I say might not be what you are thinking. But the story I heard, they place it at 15, at the time going on 16.

Q: So would a generation by your or Indian computation of time be approximately 20 years? A: I don't know. You might say 20, 30, 40 years. But on the average, I would say about 30.

Q: About 30 years? A: Yes.

Q: And thus this event, if we place it in a time context that you do, would have occurred perhaps 450 years ago? A: More or less.

Q: Now, in connection with that event, was there a cairn of rocks that was attributed to that event which is south of the present location of Yellowtail Dam?A: No. Not the present location of Yellowtail

Dam. Yellowtail Dam is about ten to fourteen miles away.

Q: That is what I said. The location of the cairn of rock — I am sory, I think I confused you in the way I worded my question. A cairn of rocks is approximately ten to fourteen, or was ten to fourteen miles south of the present location of Yellowtail Dam; is that correct? A: Right.

Q: Now, as a matter of fact, that cairn of rocks was subject to carbon data analysis by an archaeologist? A: Not the cairn itself, but the sites near that site were tested.

Q: And they dated the carbon dating process, put it at 800 to 1200 years? A: That was approximation, but just like — I am just like you, Mr. Roth, I couldn't go for that.

Q: At any rate, are you familiar with Mr. Medicine Crow's study of history of the Crow Tribal migration from Canada into the United States? A: Yes.

Q: And he has placed that migration into the present location of the Crow country at approximately the year 1700. Does that agree or disagree with you? A: It's possible.

Q: It's possible. You don't necessarily disagree with that, do you? A: I don't disagree with it and I don't agree with it because I have no way of proving it.

Q: Mr. Medicine Crow does hold a particular position in the Tribe, does he not? A: I know he is recognized as an anthropologist.

Q: Is he also the Tribal Historian? A: Yes, he was recognized as such.

Q: As a matter of fact, he was appointed to that position in 1951, wasn't he? A: Correct.

Q: Now, from what you have told me, this story

was in existence in 1887, wasn't it? A: What story are you talking about?

Q: The one that is related in Plaintiff's Exhibit — Crow Tribal Exhibit 75. A: Please, Mr. Roth, please explain something to me. I thought this was disregarded. Was it excluded?

Q: No, the Court has admitted it. And I am shortening my question to refer to that exhibit. A: I am sorry. I misunderstood. Let's start all over again. I have it right here. Let's start all over again.

Q: Was that story in existence in 1887? A: I imagine it was in existence before that time because they have been telling it from time to time up until I hear it.

Q: Now, with regard to the tribal land — strike that, please. With regard to the land of the sacred burial site, is that located — which is apparently a mile from Saint Xavier. Are you following me? A: Yes.

Q: Is that burial ground located on allotted land? A: Yes, I would say it is.

Q: And insofar as you know, was that land allotted pursuant to the Crow Allotment Act of 1920? A: Rephrase that again.

Q: Do you know whether or not the burial ground was allotted under the general Allotment Act of 1887 or whether or not it was allotted under the Crow Allotment Act of 1920? A: That I don't know, but I do know that Indian people own it.

Q: At any rate, it has been allotted whether it was under — A: Correct.

Q: —1887 Act or 1920 Act; is that correct? As I understand your testimony, the mountain areas have always been considered "good" areas, areas for fasting and areas of religious worship; is that correct? A: Correct.

Q: Do you know if this was probably the reason why approximately 400,000 acres of mountain area was reserved for tribal use under the Crow Allotment Act of 1920? A: I didn't know what the reason was, but there was a lot of respect for that area.

Q: Probably based upon your— A: Yes.

Q: —Knowledge of the tribal history, that was probably the reason; is that not true? A: It could be.

Q: Because of the particular religious significance of that particular area, correct? A: Yes, because a lot of those areas up there are respected by my people.

Q: With regard to—well, I guess that is beyond the scope.

MR. ROTH: No further questions with regard to the direct examination, Your Honor.

MR. SEYKORA: I have none, Your Honor.

MR. FREEMAN: I have none, Your Honor.

MR. SCHOPPERT: No redirect, Your Honor.

THE COURT: Thank you, Mr. Old Coyote, you may step down.

Would you call your next witness?

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable James F. Battin, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the title to the bed and banks of the Big Horn River to the high water mark is quieted in the State of Montana, and was so granted upon the State's admission to the Union.

IT IS FURTHER ORDERED and ADJUDGED that the State of Montana has exclusive jurisdiction to regulate non-Indian hunting and fishing activities on the Big Horn River and all patented land owned by non-Indians within the exterior boundaries of the Crow Indian Reservation.

IT IS FURTHER ORDERED and ADJUDGED that the State of Montana has concurrent jurisdiction with the United States to regulate non-Indian hunting and fishing activities on tribal or Indian lands if such activities are in violation of state law. The concurrent jurisdiction of the United States to so regulate non-Indian activities is predicated upon 18 U.S.C. §1165.

IT IS FURTHER ORDERED and ADJUDGED that the Crow Indian Tribe's exclusive rights of hunting and fishing within the exterior boundaries of the Crow Indian Reservation are limited to those lands set forth in 18 U.S.C. §1165.

IT IS FURTHER ORDERED and ADJUDGED that the Crow Indian Tribe has no authority to regulate non-Indian hunting and fishing activities within the exterior boundaries of the Crow Indian Reservation, save in granting permission to non-Indians to trespass on tribal or Indian lands for the purpose of hunting and fishing.

Dated at Billings, Montana, this 1st day of August, 1978.

JOHN E. PEDERSON
Clerk of Court

By:_____
Deputy Clerk

Supreme Court, U.S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

No. 79 1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Respondents

V.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTEAD, EARL L. SHERRON JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,

Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Certiorari Filed January 21, 1980
Certiorari Granted April 14, 1980

JOINT APPENDIX
VOLUME II — EXHIBITS

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PL. EXHIBIT NO. 18

Crow Agency, Montana.

May 4th 1881.

To the Departments and various Committees on Indian Affairs.

Washington, D. C.

Honorable Sirs:

We, the undersigned members of the Crow Tribal Business Committee, request the proper authority to acknowledge our hunting and fishing rights upon our own reservation, and direct it to be carried on in the proper manner so as to meet the required laws governing and protecting the rights and interests of the Crow Indians. In order to conserve the game and fish upon the Crow Indian Reservation as well as in the state of Montana there should be strict limitations placed on the out-sider who has been in the past on every day violator of those rights which we assume to have as a race of people.

The intent of the mountain reservations in the Crow Bill was to reserve the Indian a place for his wild game. This was not made for any other people for they have the whole country to hunt accept within the boundaries of the Crow Indian Reservation.

In case any person who is our neighbor wants to hunt and fish upon our reservation we, as the business committee for the Crow Tribe wish to be recognized.

James Carpenter
Chairman

Geo. W. Hogan
Secretary

James Laforge
Barney Old Coyote

This is to certify that the above signed members constitute a quorum of the Tribal Business Committee.

Geo W. Hogan

PL. EXHIBIT NO. 20
DEPARTMENT OF THE INTERIOR

United States Indian Field Service

Crow Agency, Mont.
June 7, 1921

Commissioner of Indian Affairs
Washington, D.C.

Sir:

Referring to above letter of June 3, 1921, relative to fishing and hunting on the Crow Reservation, I would refer to sundry correspondece running back over the past two years, in which I have attempted to get the Office to advise me postively what authority we might have in preventing the fishing, and just how the situation here might best be handled. This had also been the subject of some conversation with the Office when I have been there in person. This was the subject of my letter of June

2, in which I went into this matter somewhat fully. This correspondence will cover my attitude on this subject.

I do not think it advisable that any form of permit be attempted which should have to be submitted to the Business Committee. This would mean that the Business Committee would have to stay in session all the time. Whatever form of permit is authorized, if any, should be handled by the Superintendent's office.

In reference to the hunting, I do not believe any permits should be issued, but the mountain portion of the reservation should be protected as a game preserve and as a range, and I quite firmly believe, as stated in the letter above referred to that some strict regulations should be enforced, touching the Indian hunting for the reasons stated in above letter.

Very respectfully,
/s/ (Unintelligible)
Superintendent

PL. EXHIBIT NO. 28

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Myles E. Flint
Acting Chief
Indian Resources Section
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Flint:

We were advised by attorneys for the Colville Tribes that the State of Washington filed the attached memorandum by the Field Solicitor, Billings as an indication of the "Government's confusion" regarding its position in the case *Colville Confederated Tribes v. Washington*, No. C-75-146 (E.D. Wash. 1975). The memorandum of the Field Solicitor is in clear conflict with the letter of the Deputy Solicitor to the Assistant Attorney General on August 11, 1975 which requested that the United States support the Tribes in their assertions that they exercise exclusive control over hunting and fishing on the Reservation. As you know, this Department has also supported a position similar to that taken in the *Colville* case in the appeal of the district court's decision in *United States v. Finch*, 395 F. Supp. 205 (D. Mont., 1975) and in the pending case, *United States v. Montana*, Civil No. 75-105 (D. Mont.). The Field Solicitor's memorandum also conflicts with two other memoranda of this office which I attach. I have accordingly issued an opinion restating our position and withdrawing the Field Solicitor's opinion. To remove any possible confusion as to our views, I strongly urge that you immediately file this opinion with the court to clarify any confusion created by the Field Solicitor's memorandum, and advise the court of our position.

Sincerely,
Reid Peyton Chambers

Attachments

United States Department of the Interior
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MEMORANDUM

TO: Area Director, Indian Affairs, Billings
From: Associate Solicitor, Indian Affairs
Subject: Jurisdiction of State of Montana over non-Indians hunting and fishing on Indian Reservations in Montana

The memorandum of the Field Solicitor, Billings, on this subject recently came to my attention. That memorandum is in clear conflict with the policy of this Division and is hereby withdrawn. The position of this Division was previously set forth in a memorandum dated September 8, 1975 by the Assistant Solicitor for Indian Natural Resources regarding an ordinance of the Navajo Tribe. Moreover, this Department has, in a letter to the Assistant Attorney General of the Department of Justice dated August 11, 1975, requested that the United States support the Colville Tribes in their assertion that they exercise exclusive control over non-Indians hunting and fishing on their Reservation. Similarly, in two pending federal court cases,[1] this Department has also supported the position of the Crow Tribe that they exercise exclusive jurisdiction vis-a-vis the State over non-Indians hunting and fishing on the Reservation.

At issue in these matters is the extent of tribal control over the utilization of natural resources within a

[1] *United States v. Finch* CR-74-25, D. Mont., (April 9, 1975) *appeal docketed*, No. 75-2149, 9th Cir., Sept. 29, 1975; *United States v. Montana*, Civil No. 75-105, (D. Mont.).

reservation vis-a-vis that of the state. Indian tribes retain exclusive control over the rights to hunt and fish on their reservations, absent Congressional legislation to the contrary, and hence a state's attempts to enforce its fishing laws against non-Indians on trust lands within the reservation are impermissible where the non-Indians are acting with tribal authority.

When lands are reserved for the occupancy and use of Indians, that reservation includes the exclusive right to hunt and fish on such lands. *Menominee Tribe v. United States,* 391 U.S. 404 (1968); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *Kimball v. Callahan,* 493 F.2 564 (9th Cir.) *cert. denied,* 42 L.hd. 2d 292. this principle is unaffected by the fact that a reservation is established by executive order. *Qucchan Tribe v. Bowe,* 350 F. Supp. 106, 111 (S.D. Cal., 1972) appeal docketed, No. 72-3199, 9th Cir., Nov. 16, 1972; see also, *United States v. Walker River Irrigation District,* 104 F.2d 334 (9th Cir., 1939). Nor does it matter whether the document establishing a reservation specifically mentions hunting and fishing. *E.g., Monominee Tribe v. United States, supra.*

Since they hold an exclusive right to hunt and fish, tribes may lawfully enact tribal ordinances which prohibit or regulate non-Indian fishing and hunting within their reservations. *Metlakatla Indian Community v. Egan,* 369 U.S. 45 (1962); *Alaska Pacific Fisheries v. United States, supra, Oneida Indian Nation v. United States,* 165 Ct. Cl. 487, *cert. denied,* 379 U.S. 946 (1964); *Moore v. United States,* 157 F.2d 760 (9th Cir., 1946), *cert. denied,* 330 U.S. 827 (1947); *Quechan Tribe v. Rowe, supra.* Such ordinances may be enforced by the Federal Government through the operation of 18 U.S.C. § 1165 since they

constitute a denial of the "lawful authority or permission" required by that statute.

Moreover, the assertion of the state that it can regulate the conduct of non-Indians hunting or fishing with tribal permission is plainly inconsistent with the long-standing and well-established doctrine of tribal sovereignty in that it directly interferes with reservation self-government. *Williams v. Lee*, 358 U.S. 217 (1959); of. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). As the previous discussion indicates, the importance of the tribal rights to control hunting and fishing on the reservation have been continuously recognized by the courts. The critical nature of that right in conjunction with the doctrine of tribal sovereignty requires that tribes have exclusive control over those hunting and fishing on their reservations.

The practical effect of state regulation is destructive of tribal rights. For example, a state requirement that all non-Indians purchase state fishing licenses would diminish the number of non-Indians fishing on the Reservation since they would have to purchase both state and tribal licenses — thus making fishing on a reservation more expensive than in the rest of the state. And indeed, the mere threat of enforcement in many situations results in an infringement of the Tribes' rights.

Consequently, it is my view that the opinion of the Field Solicitor is incorrect and inconsistent with other positions taken by this office. I recognize, of course, that the decision in *United States v. Finch*, which we have appealed, is controlling on the Crow Reservation until it is modified or revised.

That case arose out of the criminal prosecution by the United States under 18 U.S.C. § 1165 of a non-

Indian for fishing from state-owned land adjacent to the Big Horn River within the exterior boundaries of the Crow Reservation. The Court made three separate holdings: one, that the Crow Tribe does not own the bed of the Big Horn River and thus may not control fishing on that river; two, that non-Indians fishing from non-trust land adjacent to streams and rivers are exempt from tribal control; and three (contrary to the clear line of cases cited above), that the Crow Tribe does not hold an exclusive right to hunt and fish on its own reservation, and thus may not exercise control over non-Indian hunting and fishing on the Crow Reservation.

This office considers all three of these grounds to be erroneous, and the case is presently being appealed by the Department of Justice to the Ninth Circuit Court of Appeals at this Department's request.

In the meantime that decision is controlling on the Crow Reservation.

(SGD) REID PEYTON CHAMBERS

Department of Justice

United States Department of the Interior
OFFICE OF THE SOLICITOR
P.O. BOX 1538
BILLINGS, MONTANA 59103

January 9, 1976

Memorandum

To: Area Director, Indian Affairs, Billings
Attn: Law Enforcement Services

From: Field Solicitor, Billings

Subject: Jurisdiction of State of Montana over non-Indians hunting and fishing on Indian Reservations in Montana

The memorandum dated September 8, 1975, to the Director, Office of Trust Responsibilities, Bureau of Indian Affairs, from the Assistant Solicitor, Indian Natural Resources, setting forth the opinion that the Navajo Tribe has the legal right to assert the exclusive control over hunting and fishing on the Navajo Reservation and the memorandum of the Field Solicitor, Albuquerque, relating thereto, have been considered and reviewed with specific reference to the subject matter of this letter.

On March 28, 1962, I provided an opinion to the State of Montana Fish and Game Department (copy attached) dealing with the specific question of the jurisdiction of the State of Montana over the non-Indian who violates State Fish and Game Laws while on an Indian reservation. I re-affirmed that opinion in a letter to the State Fish and Game Department dated September 5, 1972. (Copy attached.)

While I have a high regard for the authors of the opinions relating to the Navajo Reservation, I do not consider those opinions controlling with respect to the specific question of State of Montana jurisdiction over non-Indians.

I am cognizant of the fact that the law with respect to the jurisdiction of tribal and state authorities over non-Indians in general criminal matters is presently the subject of litigation in state, district and appellate courts. Although there have been significant court decisions rendered in recent years, the full ex-

tent of tribal and state jurisdictions, respectively, has not been determined. In this regard, as you are aware, the case of *United States v. Finch,* 395 F. Supp. 295 (D.C. Mont., 1975), is being appealed to the Ninth Circuit Court of Appeals and is scheduled for oral argument on January 13, 1976. The District Court in *Finch* held that the Crow Tribe does not own, the bed of the Bighorn River and thus may not control fishing on that river, that the tribe may not prohibit fishing by non-Indians on non-Indian land located within the boundaries of the reservation and that the Crow Tribe does not hold an exclusive right to fish on its reservation.

In addition, presently pending before the Montana District Court is an action, *United States v. State of Montana, ct al.,* Civil No. 75-109-DLC, seeking *inter alin,* declamatory relief that the United States and the Crow Indian Tribe have the sole authority to regulate hunting and fishing by Indians and non-Indians within the Crow Indian Reservation.

It should be remembered that we are dealing with three separate jurisdictions — federal, state and tribal. The Indian Country is not an area of exclusively one jurisdiction. Instead, the separate jurisdictions complement the other jurisdictions. Thus, under circumstances depending on the status of the person, Indian or non-Indian, and the place of the incident, trust or non-trust land, the person may be *subjected to and required to comply with* the laws and regulations of more than one jurisdiction.

The lands within a reservation, Indian Country, are part of the state in which state laws apply to the extent that they do not conflict with Federal Indian law. The test, established by *Williams v. Lee,* 358 U.S. 217 (1959), is whether the state action infringed on the right of the reservation Indians to made their

own laws and be ruled by them. The test was designed to resolve situations involving non-Indians where both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. It provides that the state can protect its interest up to the point where tribal *self*-government would be affected. (See *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (173).

In view of the foregoing, and considering the court decisions which have been rendered, including *State ex. rel. Nepstad v. Danielson*, 149 Mont. 438, 427 P.2d 689 (1967) and *Donahue v. California Justice Court for Kamath Trinity Judicial District*, 93 Cal. Rptr. 310 (1971), it continues to be my opinion that the State of Montana has jurisdiction over non-Indians on Indian reservations in Montana for violations of the Montana Fish and Game laws.

A. E. Bielefeld
Field Solicitor

Enclosures

cc:
Associate Solicitor, Indian Affairs, Washington, D.C. Regional Solicitor, Denver, Co.
(w/cy encs. to ea.)

P. O. BOX 1538
BILLINGS, MONTANA

March 28, 1962

Mr. Don Wright
State Fish and Game Department
Glagow, Montana

Dear Mr. Wright:

In our telephone conversation of March 21 with Mr. Jack Mohler of Billings and in our telephone conversation of March 22 with you, it was indicated that you desired copy of a Solicitor's opinion addressed to the question of a State Game Warden's right to make arrests on an Indian Reservation.

There are several Solicitor's opinions which make it plain that the authority of the State Fish and Game Laws does not extend to an Indian on an Indian Reservation. (57 I.D. 295; 58 I.D. 331).

However, I believe your interest was directed to the non-Indan offender who violates the State Fish and Game Laws while on an Indian Reservation. I find no Solicitor's opinion on this point and I am not certain that it has been judicially settled that a State Fish and Game Law can be violated on an Indian Reservation.

Section 1165 of Title 18 of the United States Code is a Federal prohibition against hunting and fishing on Indian land without permission. This would normally exclude the application of the State law as to Indian land, but it is not clear whether State law would be applicable to non-Indian lands within a Reservation, or to situations where the Indian Tribal Council made possession of a State license a condition to permission to hunt and fish on Indian lands. These are matters on which you may wish to secure the advice of the Attorney General of the State of Montana.

Once it is established that a non-Indian has violated the State Fish and Game Laws while on an Indian Reservation, the Game Warden's right to make an arrest would be supported by the following language in *Federal Indian Law,* U. S. Government Printing

Office, 1958, at pages 513-514:

> ". . .Indian country within a State ordinarily is not regarded as an area of exclusive Federal jurisdiction but is politically and governmentally a part of the State in which State laws apply to the extent that they do not conflict with Federal Indian Law. The scope of State jurisdiction was indicated by the Supreme Court in *United States v McGowan*, as follows:
>
> > ".* * *Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony [or reservation] of such state laws as conflict with the Federal documents. (P.589).
>
> "Is considered, the general jurisdiction of the State over non-Indians extends throughout the territorial limits of the State can as may be limited by Federal enactment. Thus, it has been held that murder of a non-Indian by a non-Indian on an Indian reservation, in the absence of express Federal Legislation to the contrary, is a matter of exclusive State jurisdiction."

Please let us know if there is further information which you require.

Sincerely yours,

A. E. Bielefeld
Field Solicitor, Billings

cc:
Mr. Jack Kohler, State Fish and Game Department, 1125 Lake Elmo Road, Billings

Area Director, Indian Affairs, Billings, Montana —
Attn: Law & Order

P. O. Box 1538
Billings, Montana 59103

September 5, 1972

Mr. Don Wright
State Fish and Game Department
Mitchell Building
Helena, Montana 59601

Dear Mr. Wright:

In our telephone conversation today, mention was made of the familiar question of the state's jurisdiction over non-Indians who violate state law while on an Indian reservation.

This question was raised some years back, and I provided a memorandum, dated March 28, 1962, copy of which is attached. I have no reason to vary the views there stated. And I am cognizant of the decision in the *Kennerly, Deernose* and *Blackwolf* cases.

Since the 1962 memorandum, the Montana Supreme Court, in *State v. Danielson*, 149 Mont. 433, 427 P.2d 689 (1967), outlined the history and background of the rule that permits the State of Montana to reach non-Indians who violate state fish and game laws while on Indian reservations. The rationale is similar to that set out in *Draper v. United States*, 164 U.S. 240 (1896), where the non-Indian offense was committed on the Crow Indian reservation.

Sincerely,

A. E. Bielefeld
Field Solicitor, Billings

Enclosure

cc:
Area Director, Indian Affairs, Billings — Attn: Law & Order Superintendent, Blackfeet Agency, Browning, Montana — 59417
(w/cy enc. to each)

AEBiclefeld:cp

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

SEPT. 8, 1975

To: Director, Office of Trust Responsibilities

From: Assistant Solicitor, Indian Natural Resources

Subject: Navajo Tribal Council Resolution CJN 28-75

In accordance with your request of July 22, 1975 we have reviewed the hunting and fishing regulations proposed by the Navajo Tribe. We support the Tribe's assertion that they exercise exclusive control over non-Indians hunting and fishing on the Reservation.

The position of the Tribe, as reflected in the proposed regulations, raises the issue of the extent of tribal control over hunting and fishing on the Reservation vis-a-vis that of the State. That question is presently the subject of litigation in the State of

Washington. in *Colville Confederated Tribes v. Washington* the Tribes are seeking to halt state interference with non-Indians fishing on their Reservation. Although the case was tried on August 19, 1975, no decision has been rendered by the Court. The Department has expressed support for the position of the Tribes, although the Government has not yet entered the case. In conjunction with that case, the Solicitor withdrew an earlier Solicitor's Opinion of March 29, 1971 which concluded that the State of Utah could exercise control over non-Indians hunting and fishing on the Uintah and Ouray Indian Reservation.

You should also be aware that the State of New Mexico has recently asserted that it has jurisdiction over non-Indians hunting and fishing on Reservations in New Mexico. The Area Director, Albuquerque, has informed the State that their position is incorrect. No response, however, has been forthcoming from the State.

The present question — whether a tribe exercises exlusive control over hunting and fishing on its reservation — has been directly addressed in two state court decisions prior to the *Colville* case. *State ex rel Nepstad* v. *Danielson*, 149 Mont. 438, 427 P. 2d 689 (1967) applied the standard, established in *Williams* v. *Lee*, 348 U.S. 217 (1959), that state law cannot apply to non-Indians within the reservation when it would "infringe on the right of reservation Indians to make their own laws and be ruled by them." The state court found that Montana had jurisdiction to enforce its fish and game laws against non-Indians on the reservation, stating:

> no convincing argument has been made to show how enforcement of state hunting and fishing

> regulations against a non-Indian would in any manner interfere with self-government on the reservation. 427 P.2d at 689.

That opinion is basically unpersuasive since the court failed to recognize the obvious conflict between the state and tribal authorities.

In *Donahue* v. *California Justice Court for the Klamath Trinity Judicial District,* 15 Cal. App. 3d 557, 93 Cal. Rptr. 310 (1971), the California Court of Appeals for the First District concluded that although the state could enforce its hunting and fishing regulations against non-tribal members, the fact that those individuals were acting with the permission of the Tribe would operate as a complete defense to any state charges.

The Navajo Indian Reservation was established under the Treaty of September 9, 1849, (9 Stat. 974) and modified by the Act of June 14, 1934 (49 Stat. 960). When lands are reserved for the occupancy and use of Indians, that reservation includes the exclusive right to hunt and fish on such lands. *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968); *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918); *Kimball* v. *Callahan,* 493 F.2d 564 (9th Cir.) *cert. denied,* 42 L.Ed. 2d 292 (1974); *United States* v. *Washington,* 384 F. Supp. 312, 332, (W.D. Wash., 1974), affm'd._____F.2d_____, (Civ. No. 74-2414, June 4, 1975, 9th Cir.). This principle is unaffected by the fact that a reservation or parts of it may have been established by executive order. *Quechan Tribe* v. *Rowe.* 350 F. Supp. 106, 111 (S.D. Cal., 1972) appeal docketed, No. 72-3199, 9th Cir., No. 16, 1972; see also, *United States* v. *Walker River Irrigation District,* 104 F.2d 334 (9th Cir., 1939). Nor does it matter whether the document establishing

the Reservation specifically mentions hunting and fishing. *E.g., Menominee Tribe* v. *United States, supra.*

Since the Navajo Tribe holds an exclusive right to hunt and fish within its Reservation, the Tribe may lawfully enact tribal ordinances which prohibit or regulate non-Indian fishing in waters within the Reservation. *Metlakatla Indian Community* v. *Egan,* 369 U.S. 45 (1962); *Alaska Pacific Fisheries* v. *United States. supra; Oncida Tribe* v. *United States,* 165 Ct. Cl. 487, cert denied, 379 U.S. 946 (1904); *Moore* v. *United States,* 157 F.2d 760 (9th Cir., 1946), *cert. denied,* 330 U.S. 827 (1947); *Quechan Tribe* v. *Rowe, supra.* such ordinances may be enforced by the Federal Government through the operation of 18 U.S.C. § 1165 since they constitute a denieal of the "lawful authority or permission" required by that statue.

Moreover, any assertion by a state that it can regulate the conduct of non-Indians hunting or fishing with tribal permission is plainly inconsistent with the long-standing and well-established doctrine of tribal sovereignty in that it directly interferes with reservation self-government. *Williams* v. *Lee,* 358 U.S. 217, (1959); cf. *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973). As the previous discussion indicates, the importance of the tribal right to control hunting and fishing on the reservation has been continuously recognized by the courts. The critical nature of that right in conjunction with the doctrine of tribal sovereignty requires that the tribes have exclusive control over those hunting and fishing on the reservation. See also *Quechan Tribe* v. *Rowe, supra.* Moreover, the practical effect of state regulation is destructive of tribal rights. For example, any requirement by a state that

non-Indians purchase state fishing licenses is certain to diminish the number of non-Indians fishing on the reservation since they will have to purchase both state and tribal licenses — thus making fishing on a reservation more expensive than in the rest of the state. And indeed, the mere threat of enforcement may result in an infringement of tribal rights.

On the basis of the above authority we support the Tribe's assertions of exclusive control over hunting and fishing on the reservation.

sgd. Lawrence Aschenbrenner

United States Department of the Interior
OFFICE OF THE SOLICITOR

ALBEQUERQUE LAND OFFICE
Room 7102 Federal Bldg. and U.S. Courthouse
P.O. Box 1696
Qlbuquerque, New Mexico 87103

December 13, 1974

Memorandum

To: Associate Solicitor, Indian Affairs

From: Field Solicitor, Albuquerque

Subject: Jurisdiction and authority to enforce fish and game las and regulations against non-Indians on Indian lands.

The United States Attorney, Albuquerque, has furnished me a copy of his letter of December 4, 1974 to the Chief, General Litigation Section, Land and

Natural Resources Division of the Department of Justice, Washington, on the above subject. Enclosed herewith are copies of the U.S. Attorney's letter and the enclosures referred to therein.

The matter referred to in the U.S. Attorney's letter is the long-standing controversy between the New Mexico Department of Game and Fish and the Navajo Tribe concerning authority of the State of New Mexico to enforce its laws and regulations concerning the taking of fish and game animals by non-Indians from lands and waters within the Navajo Indian Reservation. A similar controversy has existed between the State and the other Indian tribes and Pueblos in New Mexico, with the single exception of the Jicarilla Apache Tribe. (Apparently the Jicarillas are satisfied with their cooperative program with the New Mexico Game and Fish Department.)

I have always been of the opinion that Indian tribes have and retain the legal authority to control the taking of fish and game abounding on their lands, to the exclusion of any other government authority except the Congress of the United States. I have always felt that this is not only a proprietary right, as landowner, but that the direction of the manner in which a natural resource was taken and used (a resource belonging in common to all members of the tribe), to insure its best utilization for the tribe's benefit, is an exercise of tribal police power.

At various times, I have stated my views on this subject in support of recreational developments on the various Indian reservations in the Southwest, notably the Uintah and Ouray Reservation in Utah; the White Mountain Recreation Enterprise on the Fort Apache Reservation, in Arizona; and on the Navajo Reservation fisheries in New Mexico and

Arizona. However, Solicitor's Opinion M-36813, of March 29, 1971, foreclosed my further expression in this area. As you know, that opinion held that Utah State game laws applied to non-Indians hunting on the Uintah and Ouray Indian Reservation.

A review of this opinion shows that it rests on the proposition that an Indian tribe cannot have "title" or "ownership" in fish and wildlife since the *forae naturae* is susceptible only of capture. That proposition is then extended to the conclusion that since the tribe does not "own" the *ferae naturae,* found on its reservation, it cannot have complete authority to control the taking or capture of fish and game except as to its members, and perhaps as to other Indians within its reservation, but must yield to state license and control over non-Indians. That conclusion appears grounded in the U.S. Supreme Court decision in *Geer* v. *State of Connecticut,* 1896, 161 U.S. 519, 40 L. Ed. 793.

The *Geer* case relied on a prior Supreme Court decision in *Martin, et al.,* v. *The Lessee of Waddell,* 1842, 41 U.S. 367, 10 L. Ed. 997, in which Chief Justice Roger Taney makes the following statements:

> ". . .the English possessions in America were not claimed by right of conquest, but "by right of discovery. For according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the New World were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forebearance may have been sometimes practised towards the unfortunate aborigincs,

either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants. . . ."

In confrontations between the States and the Federal Government over the management and control of resident species of wildlife on Federally-owned lands (wildlife refuges, national parks, etc.), our office has consistently taken the position that the State's authority must yield to the power of the national government. See Solicitor's Opinion M-36672, December 1, 1964, 71 I.D. 469. Significantly, the supremacy of the Federal authority in this field has been grounded on the Constitutional doctrine that the State's regulatory jurisdiction must yield to the Federal Government's exercise of its powers under the property clause, citing *Utah Power & Light Company* v. *U.S.*, 243 U.S. 387 and *Camfield* v. *U.S.*, 167 U.S. 518.

Historically, the Indian people have regarded hunting and fishing as the most sacred and important of all their aboriginal rights to the lands they used and occupied. The various treaties made with the different Indian groups contain specific provisions regarding hunting and fishing. For example, the treaty with the Navajo Indian Tribe (1868) contains provision that the Indians ". . . retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; . . .";

". . . agree to make the reservation . . . their permanent home, and . . . will not as a tribe make any settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs . . . ."

With such rights retained as to lands outside their reservation, it seems hardly conceivable that the Indians ever intended that anyone, except the Federal Government, would have any authority to prescribe their management and control over the fish and wild game on their reservation lands.

Please review the U.S. Attorney's letter to the Department of Justice, especially the next-to-last paragraph, and advise whether I should reply or merely notify him that I have referred the matter to your office.

Lotario D. Ortega

Enclosures

1. 12/4/74 let to Justice
2. 11/25/74 let to US Atty, Aq.
3. 12/4/74 let to NM Game Comm'n.
4. 11/25/74 let to Zuni Pueblo
5. 11/25/74 let to Mescalero
6. Routing Slip
7. 11/25/74 let to Acoma Pucblo
8. 11/7/74 let to Dept. of Game & Fish, NM
9. Navajo Fishing Regs.
10. Fishing Location Map, Navajo Res.
11. 8/26/74 let to NM Game & Fish Dept.
12. Navajo Tribal Res. CAU-46-73

cc: R/Sol., Tulsa
A/ Dir., BIA, Aq.

PL. EXHIBIT NO. 30

THE TROUT FISHERY OF THE BIGHORN RIVER BELOW YELLOWTAIL DAM, MONTANA

by

HAROLD RICHARD STEVENSON

A thesis submitted in partial fulfillment
of the requirements for the degree

of

MASTER OF SCIENCE

in

Fish and Wildlife Management

Approved:

_____

Chairman, Examining Committee

_____

Head, Major Department

_____

Graduate Dean

MONTANA STATE UNIVERSITY
Bozeman, Montana
March, 1975

Composition of Fishing Parties

Individuals interviewed were classified according to residence. Fishermen residing within one hours drive of the study area were termed locals. Fishermen residing in Montana excluding locals were called residents. All fishermen residing outside the state of Montana were classified tourists.

During 1972, 457 parties were interviewed on weekends-holidays. The number of fishermen per party ranged from one to eight with a mean of 2.35. The fishermen interviewed were 12.1 percent locals, 80.0 percent residents and 8.0 percent tourists. Individuals from Billings made up 87.2 percent of all resident fishermen and individuals from Wyoming, Colorado and Minnesota made up 59.1 percent of all tourists. Adult males, adult females, and unlicensed juveniles made up 67.8, 17.9 and 14.2 percent of the fishermen.

During 1973, 1,009 parties representing 14.7 percent of the estimated total number of fishermen were interviewed on weekends-holidays and weekdays. Of all the cards given to parties continuing to fish after the interview, 62.5 percent were returned, with shore and boat fishermen returning 67.2 and 55.9 percent of their cards, respectively. The number of fishermen per party ranged from one to nine, respectively, with a mean number of 2.66.

Local residents and tourists composed 11.4, 73.4 and 15.1 percent of all fishermen, respectively. Fishermen from Billings accounted for 80.6 percent of the residents and fishermen from Wyoming, Colorado and Minnesota were 43.1 percent of the total number of tourists. On weekends-holidays locals, residents and tourists comprised 10.1, 78.6 and 11.2 percent of the fishermen, respectively. On weekdays locals, residents and tourists made up 14.8, 60.3 and 24.9 percent of the fishermen, respectively.

During 1973, adult males, adult females and unlicensed juveniles made up 67.8, 16.4 and 15.8 percent of the fishermen, respectively. This composition is comparable to that found on weekends-holidays in 1972.

CROW TRIBE EXHIBIT NO. 1
TREATY WITH THE CROW TRIBE, 1825

For the purpose of perpetuating the friendship which has heretofore existed, as also to remove all future cause of discussion or dissension, as it respects trade and friendship between the United States and their citizens, and the Crow tribe of Indians, the President of the United States of America, by Brigadier-General Henry Atkinson, of the United States' army, and Major Benjamin O'Fallon, Indian agent, with full powers and authority, specially appointed and commissioned for that purpose, of the one part, and the undersigned Chiefs, Head men and Warriors, of the said Crow tribe of Indians, on behalf of their tribe, of the other part, have made and entered into the following Articles and Conditions; which, when ratified by the President of the United States, by and with the advice and consent of the Senate, shall be binding on both parties—to wit:

ARTICLE 1.

It is admitted by the Crow tribe of Inians, that they reside within the territorial limits of the United States, acknowledge their supremacy, and claim their protection.—The said tribe also admit the right of the United States to regulate all trade and intercourse with them.

ARTICLE 2.

The United States agree to receive the Crow tribe of Indians into their friendship, and under their protection. and to extend to them, from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper to the President of the United States.

ARTICLE 3

All trade and intercourse with the Crow tribe shall be transacted at such place or places as may be designated and pointed out by the President of the United States, through his agents; and none but American citizens, duly authorized by the United States, shall be admitted to trade or hold intercourse with said tribe of Indians.

ARTICLE 4.

That the Crow tribe may be accommodated with such articles of merchandise, &c. as their necessities may demand, the United States agree to admit and license traders to hold intercourse with said tribe, under mild and equitable regulations: in consideration of which, the Crow tribe bind themselves to extend protection to the persons and the property of the traders, and the persons legally employed under them, whilst they remain within the limits of their district of country. And the said Crow tribe further agree, that if any foreigner or other person, not legally authorized by the United States, shall come into their district of country, for the purposes of trade or other views, they will apprehend such person or persons, and deliver him or them to some United States' Superintendent or Agent of Indian

Affairs, or to the commandant of the nearest military post, to be dealt with according to law. And they further agree to give safe conduct to all persons who may be legally authorized by the United States to pass through their country, and to protect in their persons and property all agents or other persons sent by the United States to reside temporarily among them; and that they will not, whilst on their distant excursions, molest or interrupt any American citizen or citizens, who may be passing from the United States to New Mexico, or returning from thence to the United States.

ARTICLE 5.

That the friendship which is now established between the United States and the Crow tribe, should not be interrupted by the misconduct of individuals, it is hereby agreed, that for injuries done by individuals, no private revenge or retaliation shall take place, but instead thereof, compliants shall be made, by the party injured, to the superintendent or agent of Indian affairs, or other person appointed by the President; and it shall be the duty of said Chiefs, upon compliant being made as aforesaid, to deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished, agreeably to the laws of the United States. And, in like manner, if any robbery, violence, or murder, shall be committed on any Indian or Indians belonging to the said tribe, the person or persons so offending shall be tried, and, if found guilty, shall be punished in like manner as if the injury had been done to a white man. And it is agreed, that the Chiefs of said Crow tribe shall, to the utmost of their power, exert themselves to recover horses or other

property, which may be stolen or taken from any citizen or citizens of the United States, by any individual or individuals of said tribe; and the property so recovered shall be forthwith delivered to the agents or other person authorized to receive it, that it may be restored to the proper owner. And the United States hereby guarranty to any Indian or Indians of said tribe, a full indemmitication for any horses of other property which may be stolen from them by any of their citizens: *Provided,* That the property stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States. And the said tribe engage, on the requisition or demand of the President of the United States, or of the agents, to deliver up any white man resident among them.

ARTICLE 6.

And the Chiefs and Warriors, as aforesaid, promise and engage that their tribe will never, by sale, exchange, or as presents, supply any nation, tribe, or band of Indians, not in amity with the United States, with guns, ammunition, or other implements of war.

CROW TRIBE EXHIBIT NO. 5

ORGANIC ACT
of the
TERRITORY OF MONTANA

An Act to provide a temporary government for the territory of Montana.

Be it enacted by the Senate and House of Representatives of the United States of American in

Congress assembled,

That all that part of the territory of the United States included within the limits, to-wit: Commencing at a point formed by the intersection of the twenty-seventh degree of longitude west from Washington with the forty-fifth degree of north latitude; thence due west on said forty-fifth degree of latitude to a point formed by its intersection with the thirty-fourth degree of longitude west from Washington; thence due south along said thirty-fourthe degree of longitude to its intersection with the forty-fourth degree and thirty minutes of north latitude; thence due west along said forty-fourth degree and thirty minutes of north latitude to a point formed by its intersection with the crest of the Rocky mountains; thence following the crest of the Rocky mountains northward till its intersection with the Bitter Root mountains; thence northward along the crest of said Bitter Root mountains to its intersection with the thirty-ninth degree of longitude northward to the boundary line of the British Possession; thence eastward along said boundary line to the twenty-seventh degree of longitude west from Washington; thence southward along said twenty-seventh degree of longitude to the place of beginning, be, and the same is hereby, created into a temporary government by the name of the territory of Montana: Provided, That nothing in this act contained shall be construed to inhibit the government of the United States from dividing said territory or changing its boundaries in such manner and at such time as congress shall deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States: Provided further, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said

territory so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Montana, until said tribe shall signify their assent to the president of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed.

§ 2. And be it further enacted, That the executive power and authority in and over said territory of Montana, shall be vested in a governor, who shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the president of the United States. The governor shall reside within said territory and shall be commander-in-chief of the militia and superintendent of Indian affairs thereof. He may grant pardons and respites for offenses against the laws of said territory, and reprieve for offenses against the laws of the United States, until the decision of the president of the United States can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of said territory, and shall take care that the laws be faithfully executed.

References

Ogle v. Town of Ronan, 112 M 394, 396, 117 P 2d

§ 3. And be if further enacted, That there shall be a secretary of said territory, who shall reside therein and hold his office for four years, unless sooner removed by the president of the United States; he shall record and preserve all laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and journals of the legislative assembly, within thirty days after the end of each session, and one copy of the executive proceedings and official correspondence, semi-annually, on the first days of January and July in each year, to the president of the United States, and two copies of the laws to the president of the senate and to the speaker of the house of representatives, for the use of congress. And in case of the death, removal, resignation, or absence of the governor from the territory, the secretary shall be, and he is hereby, authorized and required to execute and perform all the powers and duties of the governor, during such vacancy or absence, or until another governor shall be duly appointed and qualified to fill such vacancy.

§ 4. And be it further enacted, That the legislative power and authority of the said territory shall be vested in the governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of seven members having the qualifications of voters, as hereinafter prescribed, whose term of office shall continue two years. The house of representatives shall, at its first session, consist of thirteen members, possessing the same qualifications as prescribed for the members of the

council, and whose term of service shall continue one year. The number of representatives may be increased by the legislative assembly, from time to time, to twenty-six, in proportion to the increase of qualified voters; and the council, in like manner, to thirteen. An apportionment shall be made, as nearly equal as practicable, among the several counties or districts for the election of the council and representatives, giving to each section of the territory representation in the ratio of its qualified voters as nearly as may be. And the members of the council and of the house of representatives shall reside in, and be inhabitants of, the district, or county, or counties for which they may be elected, respectively. Previous to the first election, the governor shall cause a census or enumeration of the inhabitants and qualified voters of the several counties and districts of the territory to be taken by such persons and in such mode as the governor shall designate and appoint, and the person so appointed shall receive a reasonable compensation therefore. And the first election shall be held at such time and places, and be conducted in such manner, both as to the persons who shall superintend such election and the returns thereof, as the governor shall appoint and direct; and he shall at the same time declare the number of members of the council and house of representatives to which each of the counties or districts shall be entitled under this act. The persons having the highest number of legal votes in each of said council districts, respectively, for members of the council, shall be dfeclared by the governor to be duly elected to the council; and the persons having the highest number of legal votes for the house of representatives in each of said representative districts, respectively, shall be declared by the governor to by duly elected members of said house: Provided, That in case two or more

persons voted for shall have an equal number of votes, and in case a vacancy shall otherwise occur in either branch of the legislative assembly, the governor shall order a new election. And the persons thus elected to the legislative assembly shall meet at such place and on such day as the governor shall appoint; but thereafter the time, place and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties or districts to the council and house of representatives, according to the number of qualified voters, shall be prescribed by law, as well as the day of commencement of the regular sessions of the legislative assembly: Provided, That no session in any one year shall exceed the term of forty days, except the first session, which may continue sixty days.

§ 5. And be it further enacted, That all citizens of the United States, and those who have declared their intentions to become such, and who are otherwise described and qualified under the fifth section of the act of congress providing for a temporary government for the territory of Idaho, approved March third, eighteen hundred and sixty-three, shall be entitled to vote at said first election, and shall be eligible to any office within the said territory; but the qualifications of voters, and of holding office, at all subsequent elections, shall be such as shall be prescribed by the legislative assembly.

§ 6. And be it further enacted, That the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the consitituion of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States, nor

shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. Every bill which shall have passed the council and house of representatives of the said territory shall, before it becomes a law, be presented to the governor of the territory. If he approve, he shall sign it; but if not he shall return it, with his objections, to the house in which it originated, who shall enter the objections at large upon their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of such houses shall be determined by yeas and nays, to be entered on the journals of each house, respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the assembly by adjournment, prevent its return, in which case it shall not be a law: Provided, That whereas slavery is prohibited in said territory by act of congress of June nineteenth, eighteen hundred and sixty-two, nothing herein contained shall be construed to authorize or permit its existence therein.

§ 7. And be it further enacted, That all township, district and county officers, not herein otherwise provided for, shall be appointed or elected as the case may be, in such manner as shall be provided by the governor and legislative assembly of the territory of Montana. The governor shall nominate, and, by and with the advice and consent of the legislative council, appoint all officers not herein

otherwise provided for, and in the first instance the governor alone may appoint all said officers, who shall hold their offices until the end of the first session of the legislative assembly, and shall lay off the necessary districts for the members of the council and house of representatives and all other officers.

§ 8. And be it further enacted, That no member of the legislative assembly shall hold or be appointed to any office which shall have been created, or the salary or emoluments of which shall have been increased while he was a member, during the term for which he was elected, and for one year after the expiration of such term; but this restriction shall not be applicable to members of the first legislative assembly. And no person holding a commission or appointment under the United States, except postmasters shall be a member of the legislative assembly; or shall hold any office under the government of said territory.

§ 9. And be it further enacted, That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually; and they shall hold their offices during the period of four years, and until their successors shall be appointed and qualified. The said territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such times and places as may be prescribed by law; and the said judges shall, after their appointments, respectively reside in the districts which shall be assigned them. The jurisdiction of the several courts herein provided

for, both appellate and original, and that of probate courts and of justices of the peace shall be limited by law: Provided, That justices of the peace shall not have jurisdiction of any matter in controversy when the title of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and the said supreme and district courts respectively shall possess chancery as well as common law jurisdiction. Each district court, or the judge thereof, shall appoint its clerk, who shall also be the register in chancery, and shall keep his office at the place where the court may be held. Writs of error, bills of exceptions, and appeals shall be allowed in all cases from the final decisions of said district courts to the supreme court, under such regulations as may be prescribed by law. The supreme court, or the justices thereof, shall appoint its own clerk; and every clerk shall hold his office at the pleasure of the court for which he shall have been appointed. Writs of error and appeals from the final decisions of said supreme court shall be allowed, and may be taken to the supreme court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath or affirmation of either party, or other competent witnesses, shall exceed one thousand dollars, except that a writ of error or appeal shall be allowed to the supreme court of the United States from the decision of the said supreme court created by this act, or any judge thereof, or of the district courts created by this act, or of any judge thereof, upon any writs of habeas corpus involving the question of personal freedom. And each of the said distrrict courts shall have the exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested

in the district and circuit courts of the United States; and the first six days of every term of said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws; and writs of error and appeal in all such cases, shall be made to the supreme court of said territory the same as in other cases. The said clerks shall receive, in all such cases, the same fees which the clerks of the district courts of Washington territory now receive for similar services.

§ 10. And be it further enacted, That there shall be appointed an attorney for said territory, who shall continue in office four years, and until his successor shall be appointed and qualified, unless sooner removed by the president of the United States, and who shall receive the same fees and salary as the attorney of the United States for the present territory of Washington. There shall also be a marshal for the territory appointed, who shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the president of the United States and who shall execute all processes issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States. He shall perform the duties, be subject to the same regulations and penalties, and be entitled to the same fees, as the marshal of the district court of the United States for the Present territory of Washington, and shall, in addition, be paid two hundred dollars annually as a compensation for extra services. There shall also be appointed by the President of the United States, by and with the advice and consent of the senate, a surveyor general of said territory, who shall locate his office at such place as the secretary of the interior shall from time

to time direct, and whose duties, powers, obligations, responsibilities, compensation, and allowances for clerk hire, office rent, fuel, and incidental expenses, shall bfe the same as those of the surveyor general of New Mexico, under the direction of the secretary of the interior, and such instructions as he may from time to time deem it advisable to give.

§ 11. And be it further enacted, That the governor, secretary, chief justice, and associate justices, attorney, and marshal, shall be appointed by the resident of the United States, by and with the advice and consent of the senate. The governor and secretary to be appointed as aforesaid, shall, before they act as such, respectively take an oath or affirmation before the district judge or some justice of the peace in the limits of said territory, duly authorized to administer oaths and affirmations by the laws now in force therein, or before the chief justice or some associate justice of the supreme court of the United States, to support the constitution of the United States, and faithfully to discharge the duties of the respective offices; which said oaths, when so taken, shall be certified by the person by whom the same shall have been taken; and such certificates shall be received and recorded by the said secretary among the executive proceedings; and the chief justice and associate justices, and all civil officers in said territory, before they act as such, shall take a like oath or affirmation before the said governor or secretary, or some judge or justice of the peace of the territory who may be duly commissioned and qualified, or before the chief justice or some associate justice of the supreme court of the United States which said oath or affirmation shall be certified and transmitted by the person taking the same to the secretary, to be by him recorded as

aforesaid; and afterwards the like oath or affirmation shall be taken, certified, and recorded in such manner and form as may be prescribed by law. And any person who has heretofore been appointed chief justice or associate justice of the territory of Idaho, who has not yet taken the oath of office, as prescribed by the act organizing said territory, may take said oath or affirmation before the chief justice or some associate justice of the supreme court of the United States. The governor shall receive an annual salary of two thousand five hundred dollars; the chief justice and associate justies shall receive an annual salary of two thousand five hundred dollars; the secretary shall receive an annual salary of two thousand dollars. The said salaries shall be paid quarter-yearly from the dates of the respective appointments at the treasury of the United States; but no payment shall be made until said officers shall have entered upon the duties of their respective appointments. The members of the legislative assembly shall be entitled to receive four dollars each, per day, during their attendance at the sessions thereof, and four dollars each for every twenty miles travel in going to and returning from said sessions, estimated according to the nearest usually travelled routes; an additional allowance of four dollars per day shall be paid to the presiding officer of each house for each day he shall so preside. And a chief clerk, one assistant clerk, one engrossing and one enrolling clerk, a sergeant-at-arms, and doorkeeper may be chosen for each house; and the chief clerk shall receive four dollars per day, and the said other officers three dollars per day during the session of the legislative assembly; but no other officers shall be paid by the United States; Provided, That there shall be but one session of the legislative assembly annually, unless on an extraordinary occasion the governor shall think proper to call the

legislative assembly annually, unless on an extraordinary occasion the governor shall think proper to call the legislative assembly together. There shall be appropriated annually the usual sum, to be expended by the governor, to defray the contingent expenses of the territory, including the salary of the clerk of the executive department. And there shall also be appropriated annually a sufficient sum, to be expended by the secretary of the territory, and upon an estimate to be made by the secretary of the treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses. And the governor and secretary of the territory shall, in the disbursement of all moneys intrusted to them, be governed solely by the instructions of the secretary of the treasury of the United States, and shall semi-annually account to the said secretary for the manner in which the aforesaid moneys shall have been expended; and no expenditure shall be made by said legislative assembly for objects not specially authorized by the acts of congress making the appropriations, nor beyond the sums thus appropriated for such objects.

§ 12. And be it further enacted, That the legislative assembly of the territory of Montana shall hold its first session at such time and place in said territory as the governor thereof shall appoint and direct; and at said first session, or as soon thereafter as they shall deem expedient, the governor and legislative assembly shall proceed to locate and establish the seat of government for said territory at such place as they may deem eligible; Provided, That the seat of government fixed by the governor and legislative assembly shall not be at any time changed except by an act of the said assembly duly passed, and which shall be approved after due notice, at the

first general election thereafter, by a majority of the legal votes cast on that question.

§ 13. And be it further enacted, That a delegate to the house of representatives of the United States, to serve for the term of two years, who shall be a citizen of the United States, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as are exercised and enjoyed by the delegates from the several other territories of the United States to the said house of representatives; but the delegate first elected shall hold his seat only during the term of the congress to which he shall be elected. The first election shall be held at such time and places, and be conducted in such manner, as the governor shall appoint and direct; and at all subsequent elections, the time and places, and manner of holding elections, shall be prescribed by law. The person having the greatest number of legal votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly. That the constitution and all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Montana territory as elsewhere within the United States.

§ 14. And be it further enacted, That when the lands in said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections number sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same.

References

Cited or applied in Texas Pacific Coal & Oil Co. v. State, 125 M 258, 234 P 2d 452, 453.

§ 15. And be it further enacted, That, until otherwise provided by law, the governor of said territory may define the judicial districts of said territory, and assign the judges who may be appointed for said territory to the several districts, and also appoint the times and places for holding courts in the several counties or sub-divisions in each of said judicial districts, by proclamation to be issued by him; but the legislative assembly, at their first or any subsequent session, may organize, alter, or modify such judicial districts, and assign the judges, and alter the times and places of holding the courts, as to them shall seem proper and convenient.

§ 16. And be it further enacted, That all officers to be appointed by the president of the United States, by and with the advice and consent of the senate, for the territory of Montana, who, by virtue of the provisions of any law now existing, or which may be enacted by congress, are required to give security for moneys that may be entrusted to them for disbursement, shall give such security at such time and in such manner as the secretary of the treasury may prescribe.

§ 17. And be it further enacted, That all treaties, laws, and other engagements made by the government of the United States with the Indian tribes inhabiting the territory embraced within the provisions of this act, shall be faithfully and rigidly observed, anything contained in this act to the contrary notwithstanding; and that the existing agencies and superintendencies of said Indians be continued, with the same power and duties which are not prescribed by law, except that the president of the United States may, at his discretion, change the

location of the office of said agencies or superintendents.

§ 18. And be it further enacted, That until congress shall otherwise direct, all that part of the territory of Idaho included within the following boundaries, to-wit: Commencing at a point formed by the intersection of the thirty-third degree of longitude west from Washington with the forty-first degree of north latitude; thence along said thirty-third degree of longitude to the crest of the Rocky mountains; thence northward along the said crest of the Rocky mountains to its intersection with the fourty-fourth degree and thirty minutes of north latitude; thence eastward along said forty-fourth degree thrity minutes north latitude to the thirty-fourth degree of longitude west from Washington; thence northward along said thirty-fourth degree of longitude to its intersection with the forty-fifth degree north latitude; thence eastward along said forty-fifth degree of north latitude to its intersection with the twenty-seventh degree of longitude west from Washington; thence south along said twenty-seventh degree of longitude west from Washingtomn to the forty-first degree north latitude; thence west along said forty-first degree north latitude to the place of beginning, shall be, and is hereby, incorporated temporarily into, and made part of, the territory of Dakota. (Approved May 26, 18645, 13 Stat. 85.)

CROW TRIBE EXHIBIT NO. 7

FORTY-SEVENTH CONGRESS.
Sess. I. Ch. 74, 1882.

CHAP. 74— An act to accept and ratify the agree-

ment submitted by the Crow Indians of Montana for the sale of a portion of their reservation in said Territory, and for other purposes, and to make the necessary appropriations for carrying out the same.

Whereas certain individual Indians and heads of families representing a majority of all the adult male members of the Crow tribe of Indians occupying or interested in the Crow Reservation in the Territory of Montana have agreed upon, executed, and submitted to the Secretary of the Interior an agreement for the sale to the United States of a portion of their said reservation, and for their settlement upon lands in severalty, and for other purposes: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is hereby, accepted, ratified, and confirmed. Said agreement is executed by a majority of all the adult male members of said tribe, in conformity with the provisions of article eleven of the treaty with the Crow Indians of May seventh, eighteen hundred and sixty-eight, and is in words and figures as follows, namely:

"We, the undersigned individual Indians and heads of families of the Crow tribe of Indians now residing upon the Crow Reservation in the Territory of Montana, do, this twelfth day of June, anno Domini eighteen hundred and eighty, hereby agree to dispose of and sell to the Government of the United States, for certain considerations to be hereinafter mentioned, all that part of the present Crow Reservation in the Territory of Montana described as follows, to wit: Beginning in the mid-channel of the Yellowstone River at a point opposite the mouth of

Boulder Creek; thence up the mid-channel of said river to the point where it crosses the southern boundary of Montana Territory, being the forty-fifth degree of north latitude; thence case along said parallel of latitude to a point where said parallel crosses Clark's fork; thence north to a point six miles south of the first standard parallel, being on the township-line between townships six and seven south; thence west on said township-line to the one hundred and tenth meridian of longitude; thence north along said meridian to a point either west or east of the source of the eastern branch of Boulder Creek; thence down said eastern branch to Boulder Creek; thence down boulder Creek to the place of beginning; for the following considerations:

"First. That the Government of the United States cause the agricultural lands remaining in our reservation to be properly surveyed and divided among us in severalty, in the proportions hereinafter mentioned, and to issue patents to us respectively, therefor, so soon as the necessary laws are passed by Congress. Allotments in severalty of said surveyed lands shall be made as follows:

"To each head of a family not more than one quarter-section, with an addition quantity of grazing land not exceeding one quarter-section.

"To each single person over eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section.

"To each orphan child under eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; and

"To each other person under eighteen years, or who may be born prior to said allotments, one-eighth

of a section, with a like quantity of grazing land.

"All allotments to be made with the advice of our agent, or such other person as the Secretary of the Interior may designate for that purpose upon our selection, heads of families selecting for their minor children, and the agent making the allotment for each orphan child. The title to be acquired by us, and by all members of the Crow tribe of Indians, shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or his heirs, or by the judgment, order, or decree of any court, nor subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President may see fit to remove the restriction, which shall be incorporated in each patent.

"Second. That in consideration of the cession of territory to be made by us as individual Indians and heads of families of the Crow tribe to the Government of the United States, said Government of the United States, in addition to the annuities and sums for provisions and clothing stipulated and provided for in existing treaties and laws, hereby agrees to appropriate annually, for twenty-five years, the sum of thirty thousand dollars, to be expended, under the direction of the President, for our benefit, in assisting us to erect houses, to procure seeds, farming implements, and stock, or in cash, as the President may direct.

"Third. That if at any time hereafter we, as a tribe, shall consent to permit cattle to be driven across our reservation or grazed thereon, the Secretary of the Interior shall fix the amount to be paid by parties so desiring to drive or graze cattle; all moneys arising from this source to be paid to us under such rules

and regulations as the Secretary of the Interior may prescribe.

"Fourth. That all the existing provisions of May seventh, eighteen hundred and sixty-eight, shall continue in force.

"Done at Crow Agency, Montana Territory, this twelfth day of June, anno Domini eighteen hundred and eighty."

SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed a sufficient quantity of land on the Crow Reservation to secure the settlement in severalty of said Indians as provided in said agreement, and upon the completion of said survey he shall cause allotments of land to be made to each and all of the Indians of said Crow tribe in quantity and character as mentioned and set forth in the agreement above named, and upon the approval of said allotments by the Secretary of the Interior he shall cause patents to issue to each and every allottee for the lands so allotted, with the same considerations, restrictions, and limitations mentioned therein as are provided in said agreement.

SEC. 3. That for the purpose of carrying the provisions of this act into effect the following sums, or so much thereof as may be necessary, be, and they are herby, set aside, out of any moneys in the Treasury not otherwise appropriated, to be expended under the direction of the Secretary of the Interior as follows, namely:

For the expense of the survey of the lands as provided in the second section of this act, the sum of fifteen thousand dollars.

For the first of twenty-five installments, as provided in said agreement, to be used by the Secretary of the Interior in such manner as the

President may direct, the sum of thirty thousand dollars.

Approved, April 11, 1882.

CROW TRIBE EXHIBIT NO. 11-A

ORDINANCE

Be it Ordained by the Montana Constitutional Convention:

*** Page 48

2nd. That the people inhabiting said proposed State of Montana do agree and declare all right and title to the public lands lying in the boundary thereof, and to all lands lying within said limits, owned or held by any Indian or Indian tribes, and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States: and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. That the lands belonging to citizens of the United States residing without the said State of Montana shall never be taxed at a higher rate than the lands belonging to residents thereof. That no taxes shall be imposed by the said State of Montana on lands or property therein belonging, or which may hereafter be purchased by, the United States, or reserved for its use. But nothing herein contained shall preclude the said State of Montana from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, or has obtained from the United States or any person the title thereto, by

patent, or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Act of Congress containing a provisio exempting the lands thus granted from taxation. But said last named lands shall be exempt from taxation by said State of Montana so long and to such extent as such Act of Congress may prescribe.

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*** Page 533

Mr. Conrad, of Choteau: I would like to offer a resolution and ask that it be referred to the same committee.

The President: The gentleman from Choteau offers the following resolution which the Clerk will read.

The Clerk read as follows:

"Resolved that all Indian reservations within the state of Montana shall be under the jurisdiction of the United States Court."

The President: If there be no objection this resolution will be received and referred to the Committee on Judiciary.

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*** Page 627

"Mr. President: Your committee on Judiciary, to whom was referred the resolution herewith returned relating to Indian reservations, have directed me to report that they have considered the same and are of opinion that this convention has no authority under the Enabling Act or the laws of Congress to take any

action in the matter, and your committee recommend that no action be taken.

August 3, 1889. Signed DIXON, Chairman."

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"ORDINANCES.

"Be It Ordained:

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*** P 628

"Ninth, that the people inhabiting said State of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, that the lands belonging to citizens of the United States residing without the said State of Montana so shall never be taxed at a higher rate than the lands belonging to residents thereof: that no taxes shall be imposed by the said State of Montana on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the said State of Montana from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title

thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by the said State of Montana so long and to such extent as such act of Congress may prescribe.

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*** Page 878

The Clerk read Section 9 as follows: "Ninth. That the people inhabiting said State of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any Indian or Indian Tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian leands shall remain under the absolute jurisdiction and control of the Congress of the United States, that the lands belonging to the citizens of the United States residing within the said State of Montana shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the said State of Montana on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the said State of Montana from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained

from the United States or from any person a title thereto by patent or grant, save and except such lands as have been or may be granted to any Indian or Indians under any Act of Congress containing a provision exempting the lands this granted from taxation, but said last named lands shall be exempt from taxation by said State of Montana so long and to such extent as such Act of Congress may prescribe."

There being no amendment to Section 9, the Clerk read Section 10.

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*** Page 922

Second: That the people inhabiting said State of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. That the lands belonging to citizens of the United States residing without the said State of Montana shall never be taxed at a higher rate than the lands belonging to residents thereof. That no tax as shall be imposed by the said State of Montana or lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the said State of Montana from taxing as other lands are taxed any lands owned or held by any Indian who

has served his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation: but said last named lands shall be exempt from taxation by the said State of Montana so long and to such extent as such act of Congress may prescribe.

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CROW TRIBE EXHIBIT NO. 14

*** Page 989

CHAP. 543.—An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety-two, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department for the year ending June thirtieth, eighteen hundred and ninety-two, and fulfilling treaty stipulations with the various Indian tribes, namely:

For pay of fifty-eight agents of Indian affairs at the following named agencies, at the rates respectively

indicated, namely:

At the Warm Springs Agency, at one thousand two hundred dollars;

At the Klamath Agency, at one thousand two hundred dollars;

At the Grand Ronde Agency, at one thousand two hundred dollars;

At the Siletz Agency at one thousand two hundred dollars;

At the Umatilla Agency, at one thousand two hundred dollars;

At the Neah Bay Agency, at one thousand two hundred;

At the Yakama Agency, at one thousand eight hundred dollars;

At the Colville Agency, at one thousand five hundred dollars;

At the Puyallup (consolidated) Agency, embracing Nisqually and S'Kokomish and Quinaielt Agencies, at one thousand six hundred dollars;

At the Tulalip Agency, at one thousand two hundred dollars;

At the Round Valley Agency, at one thousand five hundred dollars;

At Hoopa Valley Agency, at one thousand two hundred dollars;

At the Mission Tule River (consolidated) Agency, at one thousand six hundred dollars.

At the Nevada Agency, at one thousand five hundred dollars;

At the Western Shoshone Agency, at one thousand five hundred dollars;

At the Nez Perces Agency, at one thousand six hundred dollars;

At the Lemhi Agency, at one thousand two hundred dollars;

At the Fort Hall Agency, at one thousand five hundred dollars;

At the Flathead Agency, at one thousand five hundred dollars;

At the Blackfeet Agency, at one thousand eight hundred dollars;

At the Crow Agency, at two thousand dollars;

At the Fort Peck Agency, at two thousand dollars;

At the Fort Belknap Agency, at one thousand five hundred dollars;

At the Tongue River Agency, at one thousand five hundred dollars;

At the Yankton Agency, at one thousand six hundred dollars;

At the Crow Creek and Lower Brule Agency, at one thousand eight hundred dollars;

At the Standing Rock Agency, at one thousand eight hundred dollars;

At the Cheyenne River Agency, at one thousand five hundred dollars;

At the Fort Berthold Agency, at one thousand five hundred dollars;

At the Sisseton Agency, at one thousand five hundred dollars;

At the Devils Lake Agency, at one thousand five hundred dollars;

At the Pine Ridge Agency, at two thousand two hundred dollars;

At the Rosebud Agency, at two thousand two hundred dollars;

At the Shoshone Agency, at one thousand five hundred dollars;

At the Uintah and Ouray Agency (consolidated), at one thousand eight hundred dollars;

At the Pueblo and Jicarilla Agency, at one thousand five hundred dollars;

At the Navajo Agency, at two thousand dollars;

At the Mescalero Agency, at one thousand six hundred dollars;

At the Southern Ute Agency, at one thousand four hundred dollars;

At the Omaha and Winnebago Agency, at one thousand six hundred dollars;

At the Santee Agency, at one thousand two hundred dollars;

At the Pottawatomie and Great Nemaha Agency, at one thousand two hundred dollars;

At the Ponca, Pawnee, Otoe, and Oakland Agency, at one thousand five hundred dollars;

At the Sac and Fox Agency, Oklahoma Territory, at one thousand two hundred dollars;

At the Quapaw Agency, at one thousand five hundred dollars; and not more than one thousand two hundred dollars of any moneys appropriated by this act shall be expended for clerical labor at this agency;

At the Osage Agency, at one thousand eight hundred dollars;

At the Cheyenne and Arapaho Agency, at two thousand two hundred dollars;

At the Kiowa Agency, at two thousand dollars;

At the Union Agency, at Fifteen hundred dollars;

At the White Earth Agency, at one thousand eight hundred dollars;

At the Sac and Fox Agency, Iowa, at one thousand dollars;

At the Green Bay Agency, at two thousand dollars;

At the La Pointe Agency, at two thousand dollars;

At the New York Agency, at one thousand dollars;

At the Colorado River Agency, at one thousand five hundred dollars;

At the Pima Agency, at one thousand eight hundred dollars;

At the San Carlos Agency, at two thousand dollars;

For the Eastern Cherokee Agency, eight hundred dollars; in all, ninety thousand two hundred dollars; and all provisions of law fixing compensation for Indian agents in excess of that herein provided are hereby repealed.

For the payment of necessary interpreters, to be distributed in the discretion of the Secretary of the Interior, twenty-five thousand dollars; but no person employed by the United States and paid for any other service shall be paid for interpreting.

For pay of five Indian inspectors, at three thousand dollars per annum each, fifteen thousand dollars.

For necessary traveling expenses of five Indian inspectors, including telegraphing and incidental expenses of inspection and investigation, eight thousand dollars.

Pay of one superintendent of Indian schools, four thousand dollars.

Necessary traveling expenses of one superintendent of Indian schools, including telegraphing and incidental expenses of inspection and investigation, two thousand dollars: *Provided,* that he shall be allowed three dollars per day for traveling expenses when actually on duty in the field, exclusive of cost

of transportation and sleeping-car fare: *And provided*, That he shall perform such other duties as may be imposed upon him by the Commissioner of Indian Affairs, subject to the approval of the Secretary of the Interior.

For buildings and repair of buildings at agencies, thirty thousand dollars.

For contingencies of the Indian service, including traveling and incidental expenses of Indian agents, and of their offices, and of the Commissioner of Indian Affairs, and of such person as may be detailed to accompany him, also traveling and incidental expenses of five special agents, at three dollars per day when actually employed on duty in the field, exclusive of transportation and sleeping-car fare, in lieu of all other expenses now authorized by law; for pay of employees not otherwise provided for, and for pay of five special agents at two thousand dollars per annum each, forty-five thousand dollars.

For the expenses of the Commission of citizens, serving without compensation, appointed by the President under the provisions of the fourth section of the act of April tenth, eighteen hundred and sixty-nine, five thousand dollars.

For reimbursing Anderson Healy for loss sustained by him as contractor on account of delay in the erection of a school building at Poplar Creek, Montana, such delay being caused by order of the Commissioner of Indian Affairs, fifty-nine dollars.

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CROW TRIBE EXHIBIT NO. 67

CONSTITUTION AND BYLAWS OF THE CROW TRIBE
(as amended)

PREAMBLE

The Crow Tribe of Indians, in an effort to enforce the respect of their basic human, constitutional and treaty rights, do hereby re-establish the Crow Tribal Council to represent, act and speak for the Crow Tribe in any and all tribal matters, and to promote the general welfare of the Crow Tribe, do adopt the following constitution and bylaws for the conduct of Crow Tribal matters in conjunction with the lawful right of the Bureau of Indian Affairs to conduct same.

ARTICLE I

The Crow Tribal Council shall be composed of the entire membership of the Crow Tribe.

ARTICLE II (Res. 62-11)

The council shall elect every two (2) years, in conformity to its rules of procedure, a Chairman, Vice-Chairman, Secretary and Vice-Secretary. The Chairman shall have no vote unless there be a tie vote before the council. The election for these officers shall be held the second Saturday of May every other year after May 12, then the first election shall be held under this constitutional change. Officials are to assume their duties July 1, after election.

ARTICLE III

Any duly enrolled member of the Crow Tribe, except as herein provided, shall be entitled to engage in the deliberations and voting of the council, provided the females are 18 years old and the males 21 years.

ARTICLE IV

All nominations for officers of the council and any other tribal matter before the council shall be by voice, standing, hand-raising or secret ballot, as the council shall elect at each of its meetings.

ARTICLE V

The Crow Tribe, through its tribal council, reserves unto itself the right to remove for cause any officer of the council, for misconduct or negligence or non-diligence in connection with the protection of the rights of the Crow Tribe in its relations with the Bureau of Indian Affairs or the local employees.

ARTICLE VI (res. 62-11)

The Powers, Duties, and Functions of the Council:

1. The Council shall establish its own rules of procedure.

2. Meetings. There shall be regular tribal council meetings held each year on the second Saturday of January, the second Saturday of April, the second Saturday of July, and the second Saturday of October, and as many additional meetings shall be held as tribal business may require. All meetings shall be called by the Chairman and the Committee.

3. Notice of Meetings and Agendas. It shall be the duty of the Secretary, or in his absence, the Vice-Secretary of the Crow Tribal Council to give notice of all tribal council meetings of the Crow Tribe in writing for a period of at least seven days prior to each meeting date. Notices shall be posted at one public place in each district of the reservation, and at the Agency Headquarters, and, where possible, in the local newspapers and by radio broadcast. Notices in addition to the date, time and place of the

meeting, shall list in numerical order the business to come before the tribal council meeting. No business shall be transacted at the meeting unless it has been included in the public notice. Copies of proposed resolutions or other business to be considered shall be furnished to the elected district representatives by the Tribal Secretary seven (7) days prior to meeting dates.

4. Items of business. Agenda of the tribal council meeting shall include all items required by the (1) Tribal Chairman and committee, (2) Superintendent of the Crow Agency, and (3) any petition duly signed by 100 qualified voters. All requests to the Chairman and committee for a general council meeting shall be in writing and shall clearly state the nature of the business to be presented before the general council.

5. If the Commissioner of Indian Affairs desires to present any matter to the council for its action, such request shall be presented in writing to the Chairman or the committee, who shall as herein provided, advertise such request as provided, and set the date for the council sessions.

6. Except where otherwise specified in this constitution and by-laws, decisions of the council shall be by a simple majority of the vote cast.

7. The council shall perform the duties assigned to it under this constitution and bylaws and shall have such powers in addition to those expressly conferred on it thereunder as may be necessary to achieve its effective operation and to realize its objective.

8. All matters presented and coming before the Crow Tribal Council to be voted upon by the members of the Crow Tribe shall be decided and determined by a simple majority vote.

9. There shall be a committee composed of two (2) members from each of the six districts of the Crow

Reservation and two (2) members from off-the-reservation Indians elected for a term of two (2) years, in accordance with the tribal council's rules of procedure, to act as an executive committee to work with the officers under the general direction of the council. The first election of these committee members shall be held within 30 days from and after adoption of this constitutional amendment, and all subsequent elections to be held the second Saturday of the month of May at 2-year intervals on alternate years from the tribal officials election. Each district shall select its own election judges from within said district whose expenses shall be paid from the tribal funds. The result of such elections shall be final and conclusive.

10. The Crow Tribe, through the Crow Tribal Council, shall have the power to levy, assess and collect taxes and license fees upon non-members of the Crow Tribe doing business within the boundaries of the Crow Indian Reservation, subject to review by the Secretary of the Interior.

ARTICLE VII

Status and Functions of the Council:

1. The Crow Tribal Council is the voice of the Crow Tribe.

2. The Crow Tribal Council is the medium, the body, the tribal organization through which the Crow Tribe speaks to the government and the general public.

3. The Council, representing the entire Crow Tribe, shall voice the opinions, wishes, sentiment, hopes and decisions in any and all tribal matters for the Crow people to the Congress and the Interior Department, by resolutions and through tribally elected

delegates who shall, under the instructions of the council, proceed to Washington or elsewhere to present in person such decisions and their own arguments and appeals in support thereof as the council shall direct by majority vote.

4. Subject to existing Federal law which endows the Congress with plenary powers over the Indians in their tribal state, and which in turn passes such authorities down the line to the Secretary of Interior and the Commissioner of Indian Affairs. who by regulations based upon acts of the Congress, control the management of Indian Affairs subject to constitutional limitations. The Crow Tribal Council without legal status as such, but being the mouth piece and the voice of the Crow people, will from time to time call to the attention of the Congress its views and wishes with respect to the administration of its rights, property and affairs by the Bureau of Indian Affairs.

5. Because of existing law governing Indian administration by Congress herein pointed out, the Crow Council admits its limited authority in the administration of its own tribal matters, but also, understanding the constitution limitations of the government in this same field, the Crow Tribal Council will sponsor all legislation with state, federal and local governments on behalf of the Crow Tribe, and will, through tribal council resolutions and elected delegates and representatives, consult with and otherwise deal with representatives of the department of the government of the United States on all matters affecting the interests of the Crow Tribe.

6. The Crow Tribal Council, which encompasses the entire membership of the Crow Tribe, so far as the Crow people are concerned, shall be supreme in determining by a majority vote of those attending,

any course of action taken which is designed to protect Crow tribal interests.

7. The American system of "majority rule" used in the Congress of the United States shall prevail in the decisions of the Crow Tribal Council in regularly called and duly assembled conventions, and its majority decisions shall be conclusive and binding over the losing minority.

8. The Bureau of Indian Affairs, being a part of the United States Government, shall in no wise interfere directly or indirectly through its field representatives or agents with the deliberations or decisions of the Crow Tribal Council. The council, existing under the legal handicaps herein pointed out, belongs to the Crow Tribe only, and not the government, and such will make its decisions without Indian Bureau interference or advice, inasmuch as the Indian Bureau, under the broad powers in Indian administration conferred upon the Congress and the Indian Department by both the Congress and the courts, can and does nullify Indian tribal council actions the country over when same take issue with its own views. However, the Crow Tribal Council, regardless of same, hereby reserved unto itself the right to initiate moves looking to the protection of Crow Tribe rights and interests under their treaties and under the American constitution guaranteeing all basic human rights to all who live under the American flag, and to the equal protection of the laws of our country.

9. The Crow Tribal Council in a duly called session will decide the manner of voting, whether by districts or in the council itself or whether by secret ballots in the districts or in the council, and on this issue the local Indian Bureau representatives will have no voice whatsoever—the council reserves this

right unto itself.

10. Every member of the Crow Tribe, outside of the exception herein provided for, shall have equal opportunities to discuss any and every question of tribal concern before the council, and to participate without interference, in all votes taken upon any such questions.

ARTICLE VIII (Res. 62-11)

1. This Constitution and Bylaws shall be amended by a majority vote of the qualified voters of the Crow Tribe voting at an election called for that purpose by the Tribal Council, provided that no amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs or his authorized representative.

2. All eligible tribal members may vote at such duly called elections. The enactment of rules and procedure for conducting such an election shall be the responsibility of the tribal council. The tribal council shall enact an election ordinance.

ARTICLE IX (Res. 67-18)

1. The Crow Tribe through the Crow Tribe Council shall have power to establish, own, operate maintain and engage in any business or business enterprise, either as sole owner and operator, or jointly with any person, firm or corporation, or jointly with any agency or department of the Government of the United States of American, and for the purpose of carrying out the powers herein set forth the Crow Tribal Council is authorized and empowered to use and expend tribal funds of the Crow Tribe.

AMENDMENT
CONSTITUTION AND BYLAWS
OF THE
CROW TRIBAL COUNCIL

AMENDMENT

The Constitution and Bylaws of the Crow Tribal Council shall be amended by adding Article IX, which shall read as follows:

ARTICLE IX

SECTION 1. The Crow Tribe through the Crow Tribal Council shall have power to establish, own, operate, maintain and engage in any business or business enterprise, either as sole owner and operator, or jointly with any agency or department of the Government of the United States of America. For the purpose of carrying out the powers herein set forth, the Crow Tribal council is authorized and empowered to use and expend tribal funds of the Crow Tribe.

Approved:

(SGD) ROBERT L. BENNETT

Commissioner of Indian Affairs
Washington, D.C.

Date: December 23, 1966

BYLAWS

ARTICLE I

Duties of Crow Tribal Council

1. The Chairman of the Counsil shall preside over all meetings of the council, perform all duties of the Chairman and exercise any and all authority detailed by the Council, and shall be entitled to vote only in case of a tie.

2. The Vice-Chairman shall assist the Chairman when called upon to do so; in the absence of the Chairman, shall preside and when so presiding shall have all the privileges, duties, and responsibilities of the Chairman.

3. The Secretary of the Council shall forward a copy of the minutes of all the meetings to the Superintendent of the Reservation, and the Commissioner of Indian Affairs, and the Regional Director, and shall conduct all correspondence of the Council and shall keep all records and minutes of the meetings, records as to expenditures and allotment of tribal gratuitous and other funds over which the Council has sole charge.

4. The duties of all appointed special committees or officer of the Council shall be clearly defined by resolutions of the council at the time of their creation or appointment. Such committees and officers shall report from time to time as required to the Council and their activities and decisions shall be subject to review of the Council.

5. Regular and emergency meeting of the Crow Council shall be held on call of the Chairman at Crow Agency, Montana.

6. No business shall be transacted unless a quorum of 100 is present.

7. Order of business:
   (a) Call to order by Chairman
   (b) Reading of minutes of last meeting
   (c) Unfinished business
   (d) Reports

(e) New business
(f) Adjournment

8. It shall be the duty of the Chairman of the Council to duly notice all tribal council meetings of the tribe for a period of at least seven (7) days prior to such meeting date, for decisions of the Crow Tribe affecting the sale or lease of tribal property, or of legislative matters affecting the Crow Tribe.

9. A salary is to be paid to each officer or member of the Crow Tribal Council when serving as an authorized delegate as follows:

Within the state of Montana	$10.00 per day
Outside the state of Montana, with the exception of trips to Washington, D.C.	$15.00 per day
To Washington, D.C.	$25.00 per day

In addition to the above scales of salaries a per diem is to be paid each officer or member of the Crow Tribal Council computed in accordance with the U.S. Government Travel Regulations and in addition transportation via rail, air or personal care, whichever is "administratively" determined to be in the best interest of the Crow Tribe.

APPROVAL

Resolution No. 31 adopted February 3, 1955, approved by letter to the Chairman of the Crow Tribal Council from Commissioner Glenn L. Emmons dated March 18, 1955.

ARTICLE II

RATIFICATION OF CONSTITUTION AND BYLAWS

This Constitution and the attached Bylaws, when adopted by a majority vote of those attending District Councils called to vote on accepting a Constitution and Bylaws shall be binding upon the Crow Tribe.

CERTIFICATE OF ADOPTION

Pursuant to the Constitutional election held on June 24, 1948, this Constitution and Bylaws of the Crow Tribal Council of Montana, was adopted by a vote of 295 for and 130 against in an election in which 425 votes were cast.

/s/ Robert Yellowtail
Chairman, Tribal Council

/s/ George Hogan, Sr.
Secretary, Tribal Council

/s/ L.C. Lippert, Crow Agency

APPROVAL

This Constitution and Bylaws, having been proposed and ratified by the members of the Crow Tribe on June 24, 1948, at a referendum, is herewith approved.

/s/ William Zimmerman, Jr.
Assistant Commissioner

Washington, D.C., May 23, 1949

APPROVAL

This Constitution and Bylaws, having been proposed and ratified by the members of the Crow Tribe on June 24, 1948, at a referendum, is herewith approved.

(sgd) William Zimmerman, Jr.
Assistant Commissioner

Washington, D.C., May 23, 1949

RESOLUTION NO. 62-11

A RESOLUTION OF THE CROW TRIBAL COUNCIL PROVIDING FOR THE AMENDMENT OF THE CONSTITUTION OF THE CROW TRIBAL COUNCIL, BY ADDING TO AND CHANGING ART. II, ART. VII AND ART. VIII, BY MAKING CERTAIN CHANGES BY ADDING TO AND CHANGING ART. II, ART. VI, ADDITION SECTIONS 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, ART. VIII, ADDITION SECTIONS 1, 2, AND FOR OTHER PURPOSES.

WHEREAS, there has been a need for certain changes in the Crow Tribal Constitution, it is deemed to be in the best interests of the Crow Tribe that Resolutions 107, 140, 145, 223, and 152, shall be, and the same is hereby rescinded, repealed and expunged from the Crow Tribal records;

AND WHEREAS, it is evident that the recession will enable tribal members to appoint committee members and delegates more democratically in accordance with certain existing provisions of the Crow Tribal Constitution:

NOW, THEREFORE, BE IT RESOLVED, by the Crow Tribal Council in Crow Tribal Council duly called and held this 18th day of December, 1961, that the Constitution of the Crow Tribal Council be, and hereby is amended by making the following changes in the present Crow Tribal Constitution, to-wit:

ARTICLE II

The council shall elect every two (2) years, in conformity to its rules of procedure, a Chairman, Vice-Chairman, Secretary and Vice-Secretary. The Chairman shall have no vote unless there be a tie vote before the Council. The election for these officers shall be held the second Saturday of May every other year after May 12, then the first election shall be held under this constitutional change. Officials are to assume their duties July 1, after election.

ARTICLE VI

The Powers, Duties and Functions of the Council:

1. The Council shall establish its own rules of procedure.

2. Meetings. There shall be regular Tribal Council meetings held each year on the second Saturday of January, the second Saturday of April, the second Saturday of July, and the second Saturday of October, and as many additional meetings shall be held as tribal business may require. All meetings shall be called by the Chairman and the Committee.

3. Notice of meetings and agendas. It shall be the duty of the Secretary, or in his absence, the Vice-Secretary of the Crow Tribal Council to give notice of all Tribal Council meetings of the Crow Tribe in writing for a period of at least seven days prior to each meeting date. Notices shall be posted at one public place in each district of the reservation, and at the Agency Headquarters, and, where possible, in the local newspapers and by radio broadcast. Notices in addition to the date, time and place of the meeting shall list in numerical order the business to come before the Tribal Council meeting. No business shall be transacted at the meeting unless it has been included in the public notice. Copies of proposed

resolutions or other business to be considered shall be furnished to the elected district representatives by the Tribal Secretary seven (7) days prior to meeting dates.

4. Items of business, Agenda of the Tribal Council meeting shall include all items required by the (1) Tribal Chairman and committee. (2) Superintendent of the Crow Agency, and (3) any petition duly signed by 100 qualified voters. All requests to the Chairman and committee for a general Council meeting shall be in writing and shall clearly state the nature of the business to be presented before the General Council.

5. If the Commissioner of Indian Affairs desires to present any matter to the council for its action, such request shall be presented in writing to the Chairman or the committee, who shall as herein provided, advertise such request as provided, and set the date for the council sessions.

6. Except where otherwise specified in this Constitution and By-Laws, decisions of the Council shall be by simple majority of the vote cast.

7. The Council shall perform the duties assigned to it under this Constitution and By-Laws and shall have such powers in addition to those expressly conferred on it thereunder as may be necessary to achieve its effective operation and to realize its objective.

8. All matters presented and coming before the Crow Tribal Council to be voted upon by the members of the Crow Tribe shall be decided and determined by a simple majority vote.

9. There shall be a committee composed of two (2) members from each of the Six Districts of the Crow Reservation and two (2) members from off-the-reservation Indians elected for a term of two (2) years, in accordance with the Tribal Council's rules

of procedure, to act as an executive committee to work with the officers under the general direction of the Council. The first election of these committee members shall be held within 30 days from and after adoption of this Constitutional amendment, and all subsequent elections to be held the second Saturday of the month of May at 2-year intervals on alternate years from the tribal officials election. Each district shall select its own election judges from within said districts whose expenses shall be paid from tribal funds. The results of such elections shall be final and conclusive.

10. The Crow Tribe, through the Crow Tribal Council, shall have the power to levy, assess and collect taxes and license fees upon non-members of the Crow Tribe doing business within the boundaries of the Crow Indian Reservation, subject to review by the Secretary of the Interior.

ARTICLE VIII

1. This Constitution and By-Laws shall be amended by a majority vote of the qualified voters of the Crow Tribe voting at an election called for that purpose by the Tribal Council, provided that no amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs or his authorized representative.

2. All eligible tribal members may vote at such duly called elections. The enactment of rules and procedure for conducting such an election shall be the responsibility of the Tribal Council. The Tribal Council shall enact an election ordinance.

AND, BE IT FURTHER RESOLVED, that the above listed changes are those which the Tribal Council wishes to make in the present Crow Tribal Constitution and shall do so regardless of any or all

other resolutions or provisions, and if other resolutions or constitutional changes are in conflict with the above stated rules they shall be henceforth repealed, rescinded and expunged from the records.

PASSED, ADOPTED AND APPROVED THIS 18th day of December, 1961, by the Crow Tribal Council at a duly assembled meeting of said council according to a notice given on December 11, 1961, in a duly called council, a quorum being present at Crow Agency, Montana. Votes for: *280;* Votes against: *none.*

/s/ Roger Stops
Chairman, Pro-tem
Crow Tribal Council

ATTEST:

/s/ Arthur R. Garrigus
Secretary, Pro-Tem
Crow Tribal Council

CROW TRIBE EXHIBIT NO. 71 i

RESOLUTION NO. 62-02-A

A RESOLUTION OF THE CROW TRIBAL COUNCIL RELATING TO HUNTING AND FISHING UPON THE CROW INDIAN RESERVATION.

Section 1. It shall be unlawful for any person, except members of the Crow Tribe, to hunt, fish or trap within the exterior boundaries of the Crow Indian Reservation.

Section 2. The Crow Tribal Council hereby requests that the United States Attorney serving for

the jurisdiction of the Crow Indian Reservation enforce the provisions of Sections 1164 and 1165 of the United States Code Annotated upon the Crow Indian Reservation.

Section 3. The Crow Tribal Council hereby authorizes the Chairman of the Crow Tribe to cause to be made and posted at all public entrances and highways of the Crow Indian Reservation signs and warnings, which shall read as follows:

"ENTERING CROW INDIAN RESERVATION—NO HUNTING OR FISHING ALLOWED EXCEPT BY CROW TRIBAL MEMBERS",

and there is hereby appropriated out of Crow Tribal funds an amount not exceeding one thousand and no/100 ($1,000.00) Dollars for the purpose of painting and posting such signs and warnings.

PASSED, ADOPTED AND APPROVED by the Crow Tribal Council this 11th day of August, 1961, by *unanimous* votes for passage, adoption and approval and *no* against.

/s/ John P. (Unintelligible)
Chairman, Crow Tribal Council.

/s/ (Unintelligible)
Secretary, Crow Tribal Council

The above resolution No. 62-02-A adopted 8-11-61 is hereby approved under authority delegated by secretarial order No. 2308, January 11, 1949, 114 P.R. 230-2001 and order No._____. Amend. 45 (2— P.R. _____. 10/20/____.

(sgd) Reinholt Brust
Assistant Area Director

I Recommend X
/s/ Ott. K. Weaver
Superintendent, Crow Indian Reservation.

CROW TRIBE EXHIBIT NO. 71 j

CROW INDIAN AGENCY

Crow Agency, Montana

Through: Superintendent, Crow Agency

Mr. John B. Cummins
Chairman, Crow Tribal Council

Dear Mr. Cummins:

We are returning Resolution No. 62-02-A, August 11, 1961, approving the use of $1,000 in your program Contingency Account for painting and posting of signs and warnings as outlined in Section 3.

Sections 1 and 2 are not subject to Bureau action as referred to in this resolution.

Appropriate entries should be made in your accounts to show the transfer of $1,000 from 2651 I.G. (Contingency Account) to Account 2651 1.D. (Tribal Projects). Costs of the operation will then be charged to 2651 1.D.

The sign wording as stated in Section 3 is not fully in accord with the provisions of 18 U.S.C. 1164 and 1165 (74 Stat. 469). Careful consideration should be given to the intent of the law in developing the signs to avoid any misunderstandings or erroneous statements.

Sincerely yours,

Area Director

Attachment

cc: Superintendent, Crow Agency

J.E. Duffy/gb

CROW TRIBE EXHIBIT NO. 71-k
RESOLUTION NO. 64-20

A RESOLUTION CONCERNING TRESPASS PERMIT, IDENTIFICATION CARDS, VARIOUS HUNTING REGULATIONS, AND TO APPOINT TWO ALTERNATE TRIBAL GAME WARDENS, AND FOR OTHER PURPOSES.

WHEREAS, the Crow Tribe under its new form of organization, and the establishment of additional staff members to manage its affairs and its property in accordance with the Task Force Report, and

WHEREAS, the need to undertake a portion of management of the businesses and affairs of the tribal assets is an educational project; the Crow Tribe now wishes to assume the management of hunting, fishing, and trespassing within the exterior boundaries of the Crow Reservation, so, now, therefore

BE IT RESOLVED that all hunting, fishing, and trespass permits issued by the Crow Tribe shall henceforth be issued only by the duly elected Crow Tribal Officials, the Tribal Chairman or the Tribal Secretary of the Crow Tribal Council, and

BE IT FURTHER RESOLVED that no non-Crow Indian, nor any other *person except an enrolled member of the Tribe, shall be allowed to hunt, fish, or trespass upon the Crow Indian Reservation, except that non-tribal members married to enrolled tribal members may be allowed to hunt, fish, and trespass*

if they show proof of marriage and secure an *Identification Card and a permit* at the Crow Tribal Office and have these upon their person for examination at any time by the Game Wardens, or officers, and the provisions herein provided shall be noticed by letter to the Montana Fish and Game Commission, and

RESOLVED FURTHER that the Crow Tribe wishes to appoint two (2) Crowe tribal members of act as alternates for the present acting Game Wardens; these alternate Game Wardens to be on call in the event that one or more of the present Game Wardens become ill or otherwise cannot remain on duty, and the election of these two (2) alternates shall be held upon the adoption of this resolution by the Crow Tribal Council, and

BE IT RESOLVED FURTHER that any resolution or resolutions previously passed that may be in conflict with any portion of this resolution shall herewith be repealed, rescinded, and expunged from the Crow Tribal records.

PASSED, ADOPTED AND APPROVED, this 16 day of November, 1963, a quorum being present by a vote of_____for and_____against.
_____x_____Unanimous.

_____
CHAIRMAN, CROW TRIBAL COUNCIL

ATTEST:

_____
SECRETARY, CROW TRIBAL COUNCIL

I recommend_____

I do not recommend_____

_____

SUPERINTENDENT, CROW INDIAN AGENCY

CROW TRIBE EXHIBIT NO. 71-L

December 3, 1963

Memorandum

To: Area Director, Billings Area
Attention: Tribal Operations

From: Superintendent, Crow Agency

Subject:
Crow Tribal Resolution 64-20, "A Resolution Concerning Trespass Permits, Identification Cards, Various Hunting Regulations, and to Appoint Two Alternate Tribal Game Wardens, and for other purposes"

Resolution 64-20 is an expression of the Crow Tribal Council concerning trespass permits, identification cards, various hunting regulations and two alternate game wardens.

This resolution was enacted at the general council meeting of November 16, 1963 and establishes a method of controlling hunting, fishing and trespassing on the Crow tribal lands of the reservation.

I have no objections to this resolution and feel that

the Tribe should be encouraged in the handling of problems of this type.

As the Tribe wishes to have game wardens patrolling this area, we feel that the appointment of two alternate game wardens to relieve any of the regularly appointed game wardens in cases of absence or illness is commendable and this portion of the resolution should also be approved.

Otto K. Weaver
Superintendent

Acting Superintendent

Enclosures.

CROW TRIBE EXHIBIT NO. 71-M

Tribal Operations 064

JANUARY 13, 1964

Through: Superintendent, Crow Agency

John B. Cummins, Chairman

Crow Tribal Council

Dear Mr. Cummins:

The letter is in reference to Resolution No. 64-20 which concerns trespass permits, identification cards, various hunting regulations, and among other things, the appointment of two alternate game wardens.

The Crow Tribal Council is commended for their progressive thinking in improving their organization, expanding of their staff, and their desire to undertake a portion of management of the businesses and affairs of the tribal assets.

The Superintendent formerly had the discretionary responsibility to close certain areas of the Reservation during dangerous fire seasons. We feel that this service is very important to the Tribe and should not be curtailed. We therefore concur with Resolution No. 64-20 with the understanding that the resolution to assume tribal control of the hunting, fishing, and trespassing is not in conflict with the Superintendent's emergency discretionary authority to close certain areas of the Reservation except to those persons who are considered indispensable for protection of Crow tribal lands and forest and who may be given permission to enter either by the Superintendent or Crow tribal officials.

Sincerely yours,

(Sgd) James F. Canaa

Area Director

enclosure

cc: Superintendent, Crow Agency, w/c res.
AD L & O, w/c res. & inc. memo

Commissioner, Att: Tribal Oper., w/c res : inc. carres

IChism/WMcDonald/JAhtone/kb 1/13/64

CROW EXHIBIT NO. 71 MM-1

RESOLUTION OF THE CROW TRIBAL COUNCIL RELATING TO IMPROVING THE HUNTING AND FISHING ON THE CROW RESERVATION BY ENTERING INTO A MEMORANDUM OF AGREEMENT THE BUREAU OF SPORTS FISHERIES AND WILDLIFE FOR MANAGEMENT ASSISTANCE.

WHEREAS, The Crow Indian Reservation's fish and wildlife resourse provide food and enjoyment to tribal members and

WHEREAS, the Crow Tribe is interested in promoting the recreation and fishing use by non-Indians of the Big Horn River area below Yellowtail Dam and

WHEREAS, The Bureau of Sports fisheries and Wildlife has been designated by the secretary of Interior to provide Indian tribes with technical advice concerning management of their fish and wildlife resources and to make available the planting stock required by the management plans prepared in cooperation with the tribes and

WHEREAS, it is in the best interest of the Crow Tribe to secure the advise of the people trained in fish and game management and to secure the fish necessary to make the Big Horn River the premium trout stream it can be, now THEREFORE BE IT RESOLVED, the Tribal Officers are hereby directed to enter into a memorandum of agreement with the Bureau of Sports Fisheries and Wildlife for the purpose of providing the Crow Tribe with fish and wildlife management plans and the planting stock required these plans to improve the hunting and fishing on the reservation and said memorandum will in no way jeopardize any Crow Tribal hunting,

fishing or water rights provided for by the treaty or law.

AND BE IT FURTHER RESOLVED THAT THE CROW TRIBAL RECREATION COMMISSION'S plan of operation be modified to include master planning for Crow Tribal development of the fish, wildlife, and recreation resources on the Reservation and appoint one of its members to work closely with the Bureau of Sports Fisheries and Wildlife in all of its planning efforts.

PASSED, ADOPTED AND APPROVED this 30th day of June 1970 A.D. with UNAMUNOUS votes for passage, adoption and approval and no votes against passage, adoption, and approval.

/s/ Edison Real Bird
Chairman, Crow Tribal Council

Attest:

/s/ Joseph Max Ten Bear
Secretary, Crow Tribal Council

APPROVED:

Super., Crow Indian Reservation

CROW TRIBE EXHIBIT NO. 71 MM-2

AUGUST 13, 1970

Through: Superintendent, Crow Agency

Mr. Edison Real Bird

Chairman, Crow Tribal Council

Dear Mr. Real Bird:

Resolution No. 70-51 enacted by the Crow Tribal Council on June 30, 1970, has been reviewed. The resolution authorizes Tribal officials to enter into an agreement with the Bureau of Sport Fisheries and Wildlive relative to a fisheries management program on the Crow Reservation. The resolution also amends the Crow Tribal Recreation Commission's Plan of Operation by extending the authority of that body to include master planning for development of the rich, wildlife and recreation resources on a reservation-wide basis.

In accordance with the requirements set out in paragraph II, of the recreation Commission's Plan of Operation, Resolution No. 70-51 *is hereby approved* and is effective from the date of its enactment.

Your progress in this phase of recreational development on the Crow Reservation is to be commended.

Sincerely yours,

(Sgd) Maurice W. Babby

Area Director

Acting Assistant

CROW TRIBE EXHIBIT NO. 71-qq

Administration November 14, 1973

Memorandum

To: Area Director, Billings Area Office
Attention: Tribal Operations

From: Superintendent, Crow Indian Agency

Subject: Resolution No. 74-05, Crow General Tribal Council

Enclosed are the original and five copies of Crow General Council Resolution 74-05 adopted October 13, 1973, restricting hunting and fishing on the Crow Reservation.

The resolution rescinds previous resolutions and adopts a lieu ordinance on the subject. The authority for approval of the ordinance is not with the Superintendent.

The resolution to disallow hunting and fishing on the Crow Indian Reservation expresses the feelings of the Crow people with regard to the ever increasing pressure on reservation game and abuse of hunting and fishing privileges. The tribe's desire to close the entire reservation reflects the grave concern of its members over the erosion of one of the most valued resources and hereditary rights. This office is convinced that the Crows concerns are well founded and that under existing circumstances their action is timely and fully justified. It is for this reason that action on the resolution should be studied and that consideration should include not only the Crows' legal rights to close the entire reservation but implementation of their effort to effect closure. The

reasons for the forthcoming recommendations are as follows:

1. Hunting pressure on the reservation has increased to a point where game is depleted or non-existent in vast areas. New highways, increases in population, prosperity and inflated food prices contribute greatly to the influx of sportsmen, meat hunters and poachers.

2. Regulation of hunting and fishing has become increasingly uncontrollable with the general public taking advantage of situations beyond the Crow Tribes' ability to control. The Crow Tribe is convinced that the Bureau of Indian Affairs and the State of Montana have not exhibited due concern nor have they reacted responsibly to help maintain controls.

3. Actions by the State of Montana and the National Park Service indicate that their unannounced policies are directed toward the development of the entire Crow Indian Reservation for hunting and fishing including the Tribal lands of the Big Horn Mountains, and without regard to the desires of the Crow Tribe of Indians. The attitude of the State of Montana and the National Park Service is naturally influenced by the constituency which they serve. The press of public opinion to open the entire reservation to hunting and fishing is overwhelming, except for the resistance of the Crow Indians.

4. Regulation of hunting and fishing on the reservation is ineffective under present conditions. Some conditions which contribute to ineffectual regulation of hunting and fishing are:

a. The general public has taken advantage of interspersed fee and Indian trust lands to utilize the whole reservation without respect to

land status because the State of Montana takes no responsibility for the policing of Indian lands, the Crow Tribe does not have the funds, the police force nor the authority to protect their lands and the Department of the Interior has not taken effective action to curtail violations. Enforcement is so impractical that with this knowledge and general public utilizes the whole reservation as a haven for unlimited hunting and fishing.

b. The permit system in force prior to this resolution brought in revenue estimated at $8,000. The FY 1972 Tribal Program spent $19,500 for Game Wardens and the FY 1973 Program has set up $95,000 for this purpose. It is difficult to understand why the Crow Indians should have to spend monies to perpetuate a system which encourages encroachment upon their lands and is of no tangible benefit to them.

The authority under which Tribal Game Wardens operate does not allow them to arest non-Indians for violations. They have no authority over non-Indians. The tribal wardens are not hired for the policing of Crow Indians who hunt and fish without restriction, season, or limits. Under these circumstances, it is incredulous to believe that the C row Indians should be able to protect their own interests.

c. *The State of Montana has only one Game Warden to police game violations in the whole of Big Horn County.* Enforcement by the state is only token to say the least and the state does not even give the appearance of recognizing that there is a problem.

d. The State of Montana has opened a big game season on Big Horn Lake which includes deer

and elk. This action is of great concern to the Crows. The area opened to hunting surrounds the entire Big Horn Lake and is limited to the lands within the Bureau of Reclamation take area for Yellowtail Reservoir. The federally owned land which is administered by the state for game management, consists of an area between the lakes high water level and a take line which is 35 feet higher at elevation 3675. The Crows sold the land to the federal government for the sold purpose of building a dam and reservoir. It was not the understanding that big game hunting would be permitted in this area.

It is felt that the State of Montana is taking advantage of an unintended situation to open a season here in the very heart of the Crows' most primitive area. Further, it is totally impractical to expect hunters to adhere to an unmarked takeline and the opening of a season here is an open invitation to encroachment on all reservation lands bordering the lake. The State of Montana has embarked on a course which fails to respect the rights or consider the feelings of the Crow Tribe.

The Crow Tribe's action to close the reservation to hunting and fishing is very unpopular with the general public. The reaction of the non-Indian business community is hostile toward tribal members and may result in economic sanctions being taken against the Crow people. The press is totally unfavorable to the Crows' cause. There are reports that off reservation jobs and employment are being threatened. Many state and federal employees who hunt and fish on the reservation own fee land on the reservation.

It is for these reasons that the Crow Tribe needs the full support of the Department of the Interior and the Bureau of Indian Affairs to close the reservation for an indeterminate period. If full closure is effected, then the tribe may give favorable consideration to the opening of seasons in a manner which is beneficial to the interests of the Crow people. Recommendations for action are as follows:

1. That the Secretary of the Interior approve the tribes closure of all Trust Indian lands on the reservation to non-Indian hunting and fishing and that the Bureau of Indian Affairs develop the enforcement personnel necessary to limit violations.

2. That the Bureau of Indian Affairs actively support the effort of the Crow Tribe to close all lands within the reservation boundaries. It is further recommended that the Bureau of Indian Affairs convey its support of this resolution to the State of Montana, citing detailed reasons as to why the reservation should be closed.

The Tribe has stated its intention of making refunds to all permit holders who request repayment.

Many people are anxious to know where they stand in respect to the enclosed resolution and ordinance.

Acting Superintendent

CROW TRIBE EXHIBIT NO. 71-rr

Law Enforcement Services

November 20, 1973

Through: Superintendent, Crow Agency

Mr. David J. Stewart

Chairman, Crow Tribal Council

Dear Mr. Stewart:

We are in receipt of Resolution Number 74-05. Since the Crow Tribe has authority to control hunting, fishing, and trespassing by non-Indians and Indians on Indian lands within the Reservation, no approval action is required of the Bureau. However, the following comments are for information and consideration of the Crow Tribal Council as they relate to enforcement of Federal laws.

Resolution Number 74-05 seeks to prohibit hunting, fishing, and trespassing by non-Indians on all land within the exterior boundaries of the Crow Indian Reservation. It also requests that proper officials of the United States and Crow Tribe enforce the provisions of Resolution Number 74-05 under whatever Federal statute prohibits such actions.

The Federal statute that pertains to hunting and fishing on lands within the exterior boundaries of the Crow Reservation is Public Law 86-634 enacted July 12, 1960. The law makes Federal Statute Title 18, U.S.C.A., Section 1165 applicable to Indian lands.

> Title 18, U.S.C.A., Section 1165, Hunting, trapping, or fishing on Indian land
>
> Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States that are reserved for Indian use,

> for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

Note that the provisions of Section 1165 apply specifically to:

1. Individual Indian trust land
2. Tribal trust land, and
3. Federal land held for Indian use

It appears that fee status lands even though they are within the exterior boundaries of the Reservation, were not included in the coverage of this act. Therefore the enforcement of Section 1165 on such fee land by Bureau of Indian Affairs or Tribal enforcement officers would not be authorized or prosecuted by the United States Attorney's office.

The State of Montana Fish and Game has indicated that they would be glad to meet with the tribal officials to discuss possible closure of fee land on the Reservation to all hunting and fishing, and particularly the mountain areas and the areas around Big Horn Lake. Whatever arrangements could be worked out with the State would make State law effective as it concerns non-Indian hunters and fishermen. If you are interested in such a meeting, let us know the date of your availability and we will gladly make the arrangements. It is suggested this meeting be before December 6 as we understand that is the date when the Fish and Game Commission prepares hunting regulations for the 1974 season.

There still seems to be some issue regarding boating and other use of the Big Horn River. This meeting may be helpful in clearing the existing problems in that field.

It is understood that the Crow Tribe is considering reimbursement to individuals who purchased Tribal Bird Hunting and Fishing Permits which were supposed to be valid from May 1, 1973 through April 30, 1974. We would be glad to assist in helping you set up an accurate accounting system which would be available for this procedure.

Resolution Number 74-05 has revoked the hunting and fishing permit system that was required for Indian lands. Upon posting of the Reservation stating that no hunting or fishing is allowed on Indian lands, enforcement officers will enforce the provisions of Section 1165 of Title 18, U.S.C.A.

Sincerely yours,

James F. Canan
(sgn) James F. Canan
Area Director

cc: Supt., Crow Agency

CROW TRIBE EXHIBIT NO. 74

ANNUAL REPORT OF THE
COMMISSIONER OF INDIAN AFFAIRS
TO THE
SECRETARY OF THE INTERIOR FOR
THE YEAR 1873.

WILKINSON, CRAGUN & BARKER

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1874.

OURAY. I would not object if Mr. Powell suits you, but I do not wish any one who lives in the Territory to come.

MR. BRUNOT. He is the explorer, and does not belong to the Territory.

OURAY. I would not object to him.

MR. BRUNOT. Do you think a council could be held and the white kept away?

MR. ADAMS. I think so. Ouray has given orders to his men to keep away from the miners. I heard some of the parties who were at the council last year would be back again.

MR. BRUNOT. I asked that none should come unless invited by the commission. I said that if Ouray wanted me to go, and the President asked me, if I could do any good to Ouray's people I would go. I said I would not go unless Ouray sent word that it would be of some use for me to come.

MR. ADAMS. You would want to see all the Ute Indians we can get to attend?

MR. BRUNOT. I would want to see all the Indians who can bet got together.

OURAY. Where are you going now?

MR. BRUNOT. To see the Crows. How long before you could get your people together, and when would be the best time for me to come?

OURAY. How long will you be at the Crows? You know how soon you could get to the Ute agency. In August the Utes will be hunting, but the captains can come in.

MR. BRUNOT. If a treaty is made it is necessary three-fourths of the people agree to it.

OURAY. I will talk with them and do what I can.

MR. BRUNOT. It used to be just what the chief said; but this treaty is different; it says three-fourths of the adult male Indians, and I want the treaty carried out. From now till August we will try and get Ouray's boy; and, if we can, we will take him with us. If we cannot get him, then Ouray must not be too sorry; we will still try and get him. I hope we will get him then.

OURAY. Bring the boy if you can; if you cannot I will be sorry.

MR. BRUNOT. We will do the best we can. Your boy talks English.

OURAY. Several years ago, when the Arapahoes came to Denver, I heard there was a Ute boy called Friday; but I never could see him.

MR. BRUNOT. They kept him away?

OURAY. I heard two or three years ago from a Mexican woman that the boy was alive. I would not know him.

MR. BRUNOT. When Ouray looked for the boy at Denver the Arapahoes kept him away, and we want to get him before the hide him now. I think you had better not tell your people the boy is coming, for if he does not, they will think something is wrong.

OURAY. I understand. I want to see the boy. The Utes understand you now. They have learned that you have worked good for other Indians before, and we think you will work good for us. I will tell them what you say, and they will know you are our friend.

Respectfully submitted.

THOMAS K. CREE,
Secretary.

* * * *

E.

REPORT OF THE COMMISSION TO NEGOTIATE WITH THE CROW TRIBE OF INDIANS.

SIR: We have the honor to report that under our appointment as special commissioners to negotiate with the Crow tribe of Indians, contained in your letter of May 1, 1873, viz:

Letter of the honorable Secretary of the Interior.

"DEPARTMENT OF THE INTERIOR.

"*Washington, D.C., May 14, 1873,*

"SIR: I have received your letter of the 21st ultimo, recommending the appointment of a special commission to visit the Crow tribe of Indians with a view of negotiating an agreement with the chiefs and head-men of said tribe of Indians in the Territory of Montana for the surrender of their reservation in said Territory, or of such part thereof as may be consistent with the welfare of said Indians, as provided by the act of March 3, 1873.

S 1 A

REPORT OF COMMISSIONER OF INDIAN AFFAIRS.

"In compliance with said recommendation, I hereby appoint Hon. F.R. Brunot, of the board of Indian commissioners, *Col. E. C. Kemble, of New York, and H. E. Alvord, of Virginia, to constitute said commission, for the purpose named by you.

"Messrs. Kemble and Alvord will be allowed compensation at the rate of $8 per day, in addition to

their actual and necessary expenses, while engaged in the performance of this duty. Mr. Brunot will be allowed only his actual expenses.

"You will be pleased to prepare instructions for the guidance of said commission, a draught of which you will submit to this Department for its approval.

"Very respectfully, your obedient servant,

"C. DELANO,
"*Secretary.*

"THE COMMISSIONER OF INDIAN AFFAIRS."

and the instructions of the honorable Commissioner of Indian Affairs contained in the following letter:

Letter of the honorable Commissioner of Indian Affairs.

"DEPARTMENT OF THE INTERIOR,
"OFFICE OF INDIAN AFFAIRS,
"*Washington, D. C., May 31, 1873.*

"SIR: By the terms of an act of Congress approved March 3, 1873, it is provided: "That the Secretary of the Interior be, and he is hereby, authorized to negotiate with the chiefs and head-men of the Crow tribe of Indians in the Territory of Montana for the surrender of their reservation in said Territory, or of such part thereof as may be consistent with the welfare of said Indians: *Provided*, That any such negotiation shall leave the remainder of said reservation in compact form and in good locality for farming purposes, having within it a sufficiency of good land for farming, and a sufficiency for water and timber; and if there is upon such reservation a locality where fishing could be valuable to the Indians, to include the same, if practicable; and the Secretary shall report his action, in pursuance of this

act, to Congress, at the next session thereof, for its confirmation or rejection.'

"Pursuant to the provisions of the foregoing act, and in compliance with the directions contained in letter of the honorable Secretary of the Interior, under date of the 14th instant, you are informed that a special commission has been appointed, consisting of yourself, as chairman, in conjunction with *Col. E. C. Kemble, of New York, and H. E. Alvord, of Virginia, to visit the Crow tribe of Indians and negotiate an agreement with them to the end that the objects of said act may be affected.

"You will proceed to the Crow agency, and, after consultation with the United States agent for the tribe, will assemble the Indians in open council, at some point on the reservation deemed most desirable for the purpose, and explain to them the purport and objects of the act of March 3, 1873, and of your visit.

"The Crow reserve was established pursuant to the treaty with them concluded May 7, 1868, and is bounded as follows: 'Commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone, to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning.'

"Such an extent of territory being greatly in excess of the quantity required for the necessities of the Indians, and the northern boundary thereof, throughout its entire length, being in close proximity to the proposed line of the Northern Pacific Railroad,

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*Changed to Gen. E. Whittlesey, of Washington, and James Wright, M. D., of Montana.

it is desirable that the Indians should relinquish to the Government at least a portion thereof, and consent to confine themselves within more circumscribed limits.

"It is with this end primarily in view that you should conduct your negotiations under the foregoing appointment.

"You will explain to the Indians that it is the desire of the Government that they should adopt agricultural and pastoral pursuits to the end that they may in time become self-sustaining and prosperous, and that in order to encourage them in the cultivation of such pursuits all possible aid will be afforded them in the way of stock and agricultural implements.

"Should you find them willing to relinquish upon reasonable terms any portion of their reservation to the United States, you will cause written articles of agreement to that effect to be prepared and duly signed by the chiefs and head-men of the tribe, and by each member of the commission. Such agreement must clearly describe the portion of the reservation ceded and the consideration to be paid therefor, expressed in such form as to admit of the largest discretion being exercised by the Department in relation to the manner of investing or expending such consideration for the welfare of the Indians.

"Portions of the reservation are very mountainous, and undoubtedly rich in minerals of different kinds. Many mining claims are now being worked by white settlers on the reserve, and, as reported by the agent, some of them were located before the country was set apart as a reserve for the Crows, and the miners in consequence claim priority of right. In view of these facts the agent has also heretofore recommended that the Crows should be induced to

code that portion of their reservation lying between the waters of the Big Horn and Yellowstone Rivers, as the only way in which satisfactory adjustment can be made of the difficulties that will otherwise inevitably arise between the miners and the Indians. You will, however, in negotiating with the Indians, be governed by your own judgment as to the portion most desirable for them to cede, taking due care that the portion retained by them shall be of a character best adapted to their necessities, with the end in view of their eventually becoming an agricultural and pastoral people.

"Care should also be exercised, in negotiating any agreement, that the portion of the reservation retained by the Indians for their use and occupancy shall be in compact form and in good locality for agricultural purposes, due regard being paid to the quantity of tillable land within its limits, as well as the sufficiency of the supply of water and timber. Also, if practicable, to include such fisheries as may be of value to the Indians as a means of furnishing them with supplies of food.

"It must also be clearly understood that any agreement made with the Indians will be of validity only upon its ratification by Congress, and this fact should be impressed at every opportunity thoroughly and forciby upon the minds of the Indians, in order that no misunderstanding relative thereto may exist on their part.

"Another matter to which you will give your attention is the contemplated change in the location of the Crow agency. The present location thereof is understood to be highly unfavorable and unsatisfactory to the Indians, being remote from timber, and having an insufficient quantity of good agricultural land in its vicinity, as well as being greatly exposed to high winds.

"You will consult with Superintendent Wright and Agent Pease in relation to this matter, and will obtain all the information in your power as to the most suitable point for locating such agency, and report your views concerning the same to this office.

"The duties enjoined upon you in the foregoing instructions will be entered upon immediately after the completion of the duties assigned you as chairman of the special commission to visit and negotiate with the Northern Sioux, parties to the treaty of 1868.

"You will be allowed your actual necessary expenses while engaged in the performance of the duties assigned you, vouchers for which, when practicable, should be obtained and submitted to this office with your account.

"You will submit a detailed report of your proceedings at the earliest day practicable, accompanied by such form of written agreement as may have been entered into with the Indians.

"Very respectfully, your obedient servant,

"EDW'D P. SMITH,
"*Commissioner.*

"Hon. FELIX R. BRUNOT,
"*Chairman Special Commission, Pittsburgh, Pa.*"

The special commission to negotiate a treaty with the Crow Indians have the honor to make the following report:

In accordance with the instructions of the honorable Commissioner of Indian Affairs, Felix R. Brunot, chairman of the commission, accompanied by Thomas K. Cree, secretary, arrived at Bozeman, July 7, 1873. Arrangements were at once made to gather all the Crow Indians at the agency for a council.

On the 29th of July, General E. Whittlesey and Dr. James Wright, members of the commission, arrived at Bozeman. The next day a conference of the commission was held. The chairman read to the commission the letter of the honorable Secretary of the Interior, of date May 14; the letter of the honorable Commissioner of Indian Affairs, of date May 31; report of Agent Pease, of date April 30; and the treaty made with the Crows at Fort Laramie, May 7, 1868.

July 31 we drove to the Crow agency, found that the main body of Indians had not yet arrived, but some thirty chiefs and head-men, representing the Mountain and River Crows, had been sent forward to meet the commission.

The next morning we had a conference with them, Blackfoot, the second chief of the Mountain Crows, being the spokesman. He informed us that the main body of the Indians were encamped some distance from the agency, and could not arrive before the 8th or 10th of August. He accounted for their delay in getting to the agency, after the arrival of the messenger in their camp, by the fact that they had been fighting a large war-party of the Sioux, who were following them, necessitating great care in the moving of the women, children, and camp-equipage; to the prevalence of skickness from which many had died, and to the high stage of water, which delayed them considerably, as there was great danger in crossing the swollen strreams. He told the commission that the party would return to the camp the following day, and would come back with it to the agency as expeditiously as possible. A full report of this conference will be found in the accompanying documents.

The main body of the River Crows left Benton in

good season to reach the agency, but, as we were informed, when some four days on their journey were stopped by parties interested in keeping them in the vicinity of the trading-posts on the Missouri River.

The main camp arrived at the agency August 8. The erysipelas was prevailing among them in a contagious form; many had died from it, and Iron Bull and Blackfoot the two principal chiefs, were both sick. Long Horse, the third chief and most prominent warrior, was in mourning for the death of his brother, who had been killed a few days before in the encounter with the Sioux.

The issue of provisions prevented the holding of a council the next day, the Indians giving as a reason for not wishing to come into council the sickness of Iron Bull and Blackfoot.

The council convened on the 11th of August. There were present, in addition to the members of the commission, General Sweitzer, commandant of Fort Ellis, Dr. Lightfoot, U.S.A., Captain Tyler and Lieutenant Rowe, of Company F, Second Cavalry, Major Pease, agent for the Crows, Nelson Story, *esq.*, of Bozeman, Charles Hoffman, trader several of the employees of the agency; and, of the Indians, Iron Bull, Blackfoot, and all the principal chiefs, and a large number of Indians representing both branches of the Crow tribe.

In opening the council the chairman expressed the regret he had felt at not meeting the Crows on a former visit, and the pleasure it gave himself and the other members of the commission to meet them at the present time. We then read and explained to the Indians the treaty made by them at Fort Laramie in 1868, the act of Congress of March 3, 1873, under which the commission was appointed, and the letter of instructions of the honorable Commissioner of Indian Affairs.

We dwelt upon the fact of the miners in large numbers being on the reservation; of the recent discovery of gold and silver mines; and of the danger of trouble unless the Indians were willing to sell a portion of their reservation, which was of little use to them, and accepting in payment a satisfactory sum of money that should be expended for their benefit.

We referred to the probability of the Northern Pacific Railroad coming along the Yellowstone, and that it might come upon their reservation; and we explained the necessity for a new location for the agency buildings, and offered to go with the agent and the Indians and select a new location for it. The council lasted four days. A full report of it will be found in the accompanying documents.

On the fifth day of the council, finding the Indians were not likely soon to come to an agreement, for the purpose of inducing an immediate decision, we formally closed the council.

Early the next morning all the chiefs and head-men came and expressed a desire to sign the agreement. After ascertaining that they fully understood the articles of convention, the chairman said, "You have come to tell us that you agree to the exchange of your present reservation on the Yellowstone for Judith's Basin, and wish to agree to the paper."

Iron Bull, Blackfoot, and all the chiefs said, "Yes, we all agree to it."

The Indians having expressed an unwillingness to touch then pen in making their mark, thinking it was "bad luck" to do so, the chairman said. "We wish you all to come, one at a time, and say 'yes' or 'no' to the paper. We wish you to bring in all the others, and they will say 'yes' or 'no,' and then none you say 'yes' can afterward say 'we did not agree to it.'"

The chiefs thought if they agreed to it, it was suf-

ficient, as all the tribe would abide by their decision, but we insisted that all should approve or disapprove of it.

They then came forward, and as each said "yes," his name was signed to the articles of convention.

All agreed to it, except one head-man named "Crazy," who refused to express an opinion either way.

Each, as he said "yes," asked that they might be permitted to eat buffalo for a long time, to which the commissioners responded "yes," as the Indians shook bands with them, respectively. Others asked for guns and horses; many asked that Agent Pease might be retained. To all of their requests the commissioners answered that there was nothing in the paper about these things, and that they only said "yes" to what was in the agreement, but told them when the young men went to Washington they could talk to the "Great Father" about giving them what they wished.

The necessity for the ratification by Congress of the articles of convention it was difficult to have them understand; but it was explained to them as fully as possible during the council. We made no promises to the Indians other than those contained in the articles of convention, and no conference in regard to it was held by us with the chiefs, or other Indians, except in public council.

The sessions of the council were all well attended, all the chiefs and head-men, and many Indian men and women, being present at every session; and we have every reason to think the action of the council meets with the almost unanimous approval of the Indians party to it.

The River Crows will, we doubt not, approve of the action of those representing them, as they have

always lived in the section of country now set apart as their reservation.

In accordance with the desire expressed by all the Indians in council and elsewhere, we authorized Agent Pease to take to Washington eight Indians, chiefs and others, representing both the Mountain and River Crows, to be accompanied by one interpreter. We were the more willing to take this action, for the reason that no member of the Crow tribe has ever been East, and their idea of "the white man's" power and civilization is very meager. Their steady friendship for the whites, whom they have always had every reason to suppose inferior to them in number and power, we thought also merited some return. The trip to the East will, we doubt not, prove of lasting benefit to the tribe.

The request made during and after the council, for a present of horses, we did not feel at liberty to accede to, yet we have no hesitation in recommending that such a present be made. At the time of making their former treaties, they have always been given horses, a present they prize above all others. In view of the advantages that will accrue to the Government from the arrangement entered into, and the fact that, while attending upon the sessions of the council, a large number of their horses were stolen, as well as in return for the friendship they have always exhibited for the whites, we would respectfully recommend that they be presented with one horse for each lodge or family. It is presumed that funds appropriated for beneficial purposes for the Crow tribe of Indians are available for this purpose.

We would call special attention to the last clause of the articles of convention, in which it is agreed upon the part of the commissioners that, "pending action by Congress, the United States shall prevent

all further encroachment upon the present reservation of the Crow tribe," and respectfully recommend that instructions be sent the agent to prevent all whites from passing over, settling upon, or residing in said territory, except such as are specially exempted by the treaty of 1868, and such others as are now engaged in mining in Emigrant Gulch; that he be directed to prevent all exploring parties or individuals from entering upon the reservation, and that any one engaged in hunting or trapping for game be arrested and turned over to the civil authorities.

We also respectfully recommend that, pending the action of Congress, the section of country described in the first article of the articles of convention be, by order of the President, withdrawn from market, and that it be declared not to be open for, or subject to, entry under the homestead or pre-emption laws. There are at present no settlers in any portion of this country, and this recommendation is made to prevent any such entering upon it, pending action by Congress. In case Congress should ratify the action of this commission, we would further respectfully recommend that agents of tribes, other than the Crows, be directed, as far as possible, to prevent them from hunting in Judith's Basin.

That Congress be requested to define the penalty for wolfing or killing game by means of poison in the section of country contiguous to the proposed reservation, as described in article fourth of the articles of convention.

That an appropriation be asked for the erection of agency buildings, in accordance with the provisions of the treaty of 1868, and that a commission be appointed by the honorable Secretary of the Interior to locate the agency at a suitable place in the Judith

Basin, as far south as is practicable, keeping in view the necessity for wood, water, grass, and a sufficient body of tillable land susceptible of easy irrigation, and not so elevated as to render crops uncertain.

Very respectfully submitted.
FELIX R. BRUNOT,
R. WHITTLESEY,
JAMES WRIGHT,
Commissioners.

Thomas K. Cree, *Secretary.*

Supplementary report by the chairman of the commission.

PITTSBURGH, *November 19, 1873.*

SIR: In addition to the report of the Crow commission, prepared by the secretary under the direction of my colleagues when *en route* from the agency, and already in your hands, I have the honor to submit a brief explanation of the reasons influencing the commission in their negotiations.

The official instructions seemed to contemplate mainly the purchase of the western portion of the reserve, but your letter to the chairman was understood to leave a wider discretion with the commission.

We found that the principal region already occupied by the miners was along Emigrant Gulch, extending thirty or forty miles eastwardly into the mountains from the western border of the reserve, and upon Clarke's Fork of the Yellowstone River, and that the prospectors were gradually extending their operations, and could not long be prevented from overrunning the entire mountain region boun-

ded by Clark's Fork and the Yellowstone River. The Indians claimed the country around the heads of Clarke's Fork and the east branches of the Yellowstone in Wyoming Territory; and, although not upon the reserve, it was impossible to convince them that it had not been originally included. We also found that the topographical features of the country were such as to admit of no dividing-line, west of Pryor's Creek, which would be satisfactory either to the commission or the Indians; or which would not, if adopted, become, very soon, the cause of serious misunderstanding and contention between the whites and Indians.

The portion of the reserve which lies east of Clarke's Fork, and includes Pryor's Creek, is within the limits of the country claimed by the Sioux as their hunting grounds. It is constantly frequented by them in large bands for the purpose of fighting the Crows, and is the battle-ground upon which the two tribes often meet.

The Sioux largely outnumber the Crows, and have even extended their raids against them to the present agency. To remove this friendly tribe to so close a proximity to their powerful enemies would be wrong, and would involve the necessity of a military fort, and a considerable force for their protection, which would be costly and inexpedient.

The commission further considered that the Northern Pacific Railroad would be located for three hundred miles along the present reservation, and one or more roads already projected from the southward would pass through it, and that the valley of the Yellowstone, and the valleys of the many fine streams emptying into the south side of that river, affording some of the choicest lands in the West for cultivation and stock, would, when thus rendered ac-

cessible to the whites, be irrepressibly demanded for their use, and make the removal of the Crow Indians a necissity.

To anticipate this necessity while there yet remained unoccupied a more retired district of country suitable to their needs, and which could be given to them, seemed of incalculable importance to the future welfare of the Indians. Postponement of the selection of a proper location for a few years would probably leave no place for them but the cold and arid region north of the Missouri River. On the other side, it was considered that the peaceable release of the fine body of land included in the Crow reserve, already partially occupied, and the possession of which must soon seem a necessity, and the avoidance of future possible controversy and bloodshed between the whites and its proper owners, was of the greatest importance to the Government.

The Judith Basin, lying out of the present and prospective line of migration, surrounded by a belt of mountains and barren lands destitute of valuable ores to attract their cupidity, and relatively inaccessible to the whites, yet possessing within itself the necessary requisites for farming—land, grass, wood, and water—and not too large for the future needs of the Indians, seemed peculiarly adapted for the purpose of a reservation.

The sum of money agreed to be invested for the Indians is a very moderate price for the quantity of land they relinquish. Probably a larger sum than the interest of the capital funded would in any event be required to be expended annually for their maintenance until they become self-supporting. Hence the ratification of the contract would involve no additional expenditure on the part of the Government.

I desire, in behalf of myself and colleagues, to ex-

press our obligations to Col. N. B. Sweitzer, commanding Fort Ellis, for facilities furnished and efficient co-operation; and to himself and to all the officers of the fort for many personal courtesies and attentions; also to Agent F. D. Pease and the employes of the agency, for their zealous co-operation.

Respectfully submitted.

FELIX R. BRUNOT,
Chairman of Commission.

Hon. C. DELANO,
Secretary of the Interior.

Articles of convention made and concluded on the sixteenth day of August, in the year of our Lord one thousand eight hundred and seventy-three, at the Crow agency, in the Territory of Montana, by and between Felix R. Brunot, E. Whittlesey, and James Wright, commissioners in behalf of the United States, and the chiefs, head-men, and men representing the tribe of Crow Indians, and constituting a majority of the adult male Indians belonging to said tribe.

Whereas a treaty was made and concluded at Fort Laramie, Dak., on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between commissioners, on the part of the United States, and the chiefs and head-men of and representing the Crow Indians, they being duly authorized to act in the premises;

And whereas by an act of Congress, approved March 3, 1873, it is provided, "That the Secretary of the Interior be, and he is hereby, authorized to negotiate with the chiefs and head-men of the Crow tribe of Indians in the Territory of Montana for the

surrender of their reservation in said Territory, or of such part thereof as may be consistent with the welfare of said Indians: *Provided*, That any such negotiation shall leave the remainder of said reservation in compact form, and in good locality for farming purposes, having within it a sufficiency of good land for farming, and a sufficiency for water and timber; and if there is upon said reservation a locality where fishing could be valuable to the Indians, to include the same if practicable; and the Secretary shall report his action, in pursuance of this act, to Congress at the next session thereof, for its confirmation or rejection;"

And whereas, in pursuance of said act of Congress, commissioners were appointed by the Secretary of the Interior to conduct the negotiation therein contemplated:

The said commissioners on the part of the United States, and the chiefs, head-men, and men, constituting a majority of the adult males of the Crow tribe of Indians, in behalf of their tribe, do solemnly make and enter into the following agreement, subject to the confirmation or rejection of the Congress of the United States, at the next session thereof:

ARTICLE I.

The United States agrees that the following district of country, to wit: commencing at a point on the Missouri River opposite to the mouth of Shankin Creek; thence up said creek to its head, and thence along the summit of the divide between the waters of Arrow and Judith Rivers, and the waters entering the Missouri River, to a point opposite to the divide between the head-waters of the Judith River and the waters of the Muscle-Shell River; thence along said

divide to the Snowy Mountains, and along the summit of said Snowy Mountains, in a northeasterly direction, to a point nearest to the divide between the waters which run easterly to the Muscle-Shell River and the waters running to the Judith River; thence northwardly along said divide to the divide between the head-waters of Arnell's Creek and the head-waters of Dog River, and along said divide to the Missouri River; thence up the middle of said river to the place of beginning, (the said boundaries being intended to include all the country drained by the Judith River, Arrow River, and Dog River,) shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes, or individual Indians, as, from time to time, they may be willing, with the consent of the United States, to admit among them. And the United States now solemnly agrees that no person, except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians; and the United States agrees to erect the agency and other buildings, and execute all the stipulations of the treaty of Fort Laramie, (the said stipulations being hereby re-affirmed,) within the limits herein described, in lien of upon the south side of the Yellowstone River.

ARTICLE II.

The United States agrees to set apart the sum of one million of dollars, and to hold the same in trust

for the sole use and benefit of the Crow tribe of Indians, the principal to be held in perpetuity, and the interest thereof to be expended, or re-invested at the discretion of the President of the United States, annually, for the benefit of said tribe.

ARTICLE III.

It is mutually agreed between the United States and the Crow Indians that the second article of the treaty made at Fort Laramie, between the commissioners of the United States and the Crow tribe of Indians, be, and the same is, abrogated by this agreement; and the said Indians hereby code to the United States all their right, title, and claim to the tract of country described in the said second article, to wit: "Commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning," and which is conveyed to them therein, except the right to hunt upon said lands so long as they may remain unoccupied, and as game may be found thereon and peace continues between the whites and Indians.

ARTICLE IV.

The United States agrees to suppress, so far as possible, by the imposition of pains and penalities, the practice of wolfing, or killing game by means of

poison, within the limits of the following district of country, viz: Beginning at the mouth of the Muscle-Shell; thence up the said river to the North Fork, and up the North Fork to its source; thence northward along the summit of the Little Belt and Highwood Mountains to the head of Deep Creek; thence down said creek to the Missouri River, and along the margin of said river to the place of beginning.

It is expressly understood between the commissioners and the Indians, parties thereto, that this agreement is subject to the ratification or rejection of the Congress of the United States at its next session, and that, pending the action of Congress, the United States shall prevent all further encroachments upon the present reservation of the Crow tribe.

FELIX R. BRUNOT,
E. WHITTLESEY,
JAMES S. WRIGHT,
Commissioners in behalf of the United States.

Attest:
THOMAS K. CREE, *Secretary.*

PIERRE his ± mark *SHANE,*

MITCH his ± mark *BOYER,*

Interpreters.

Iron Bull, Che-vo-te-pu-ma-ta.
Black Foot, Kam-ne-but-se.
Long Horse, E-che-to-hats-ke.
Show-his-face, In-tee-us.
Bear Wolf, Isa-auchbe-te-se.
Thin Belly, Ella-causs-so.

Good Heart, Uss-pit-ta-watse,
Old Onion, Mit-hu-a.
Red Sides, Si-ta-pa-ruse.
Crazy Head, A-su-ma-ratz.
Bull chief, Ise-la-mats-ctts.
Shot-in-the-jaw, Esa-woor.
Lone Tree, Mone-a-mut-eats.
In-the-morning, A-a-Seitz.
Boy-that-grabs, Seeateots.
White Forehead, E-seha-chire.
Small Waist, E-hene-pea-carts.
Flat Side, Oos-tsoo-ch-scots.
Old Dog, Bis-ca-carriers.
The next, Ish-shis-shee-ess.
Crazy-sister-in-law, Ou-at-ma-ra-sach.
The Spider-that-Creeps, Ah-spe-di-ess.
Crazy Pon de' Orai, Minne-hu-ma-ra-chae.
Bull-goes-a-hunting, Ce-da-nu-ta-cass.
Crane-in-the-Sky, A-pil-Mouse.
Coon-Elk, Chin-ka-shee-arache.
The Old Crow, Perits-har-sts.
White Otter, Ma-pu-ku-he-te-te-suish.
Long-Snake, Bi-ka-che-hats-ki.
White Mouth, Te-de-sil-se.
Pock-Mark, Te-spu-ke-he-te.
The White Bull, Te-shu-not.
The No Hand, Te-si-closst-so-ish.
The little Antelope, Uk-ha-nak-ish.
Curley, Ash-ish-ish-e.
The Ridge, E. Nak-he-sash.
Big Horse, Te-le-si-cle-is-ash.
Calf in the mouth, Nak-pak-a-e.
Old Mountain Tail, A-mak-ha-viss-ish.
Bear in the water, Me-mum-ak-hiss-is-e-ish
One Feather, Mash-u-a-mo-te.
The Mix, Ma-ish-ish.
Bell Rock, Mit-a-wosh.

New Lodge, As-hi-hash.
The Rings, She-da-nat-sik.
Well Bull, Te-si-do-po-mo.
The Shaven, Bish-i-ish.
The one who hunts his debt, Ash-e-te-si-Oish.
One who hears good, Ma-in-ke-ku-te-sit-sine.
The Burnt, Osh-Nish.
Bear Robe, Ach-je-it-se-is.
The River, A-ash-ish.
Big Forehead, Ak-hi-es-ash.
The one who knows the bull, Te-se-do-pe-e-a-te-sa.
Bit Kettle, Bi-re-ke-hi-tash.
Chief Wolf, No-it-a-ma-te-sets.
The Leg, Te-tu-se-pe.
The man who sits in the middle of the ground, A-ive-ku-a-ta-mish.
Blinkey, Bish-te-ha-mo-te-te.
One who sees all over the land, A-we-ko-to-e-ka.
Bull all the time, Te-si-doss-ko-te-so-te.
Plenty of bear, A-che-pil-se-a-hush.
Rides behind a man on horseback, Ma-me-ri-ke-ish.
Bird off the ground, Ma-pe-she-ri.
Charge through the camp, Ash-e-ri-i-a-was-sash.
The old Bear, Ak-hi-pit-se-u-ke-hi-ke-ish.
Crazy Wolf, Te-se-te-man-ache.
The Plume, Te-se-do-pic-shu.she-ish.
Old Alligator, Bo-ru-ke-he-sa-cha-ri-ish.
Bob-tail Bear, Ak-hi-pilse-u-ke-hi-ke-ish.
Pole Cat Look behind, Te-spit-te-sash.
Wolf Bow, Te-sets-sha-tak-he.
The Sioux that runs fast, Ak-man-ash-up-pe-yeu-hu-she.
Little Soldier. The one who hunts his enemy.
Bull Rock. Pretty Lodge. Herd the Horses.
Three Wolf. Stray Horse.

We, the undersigned, were present at and wit-

nessed the assent of the Crow chiefs, head-men, and men of the Crow tribe of Indians, whose names are attached thereto.

THOMAS K. CREE,
Secretary Special Crow Commission.
C. W. HOFFMAN
R. W. CROSS
I. M. CASTNER.
F. GIESDORF.
F. D. PEASE,
Agent for Crow Indians.

The undersigned were present at the council with the Crow Indians, and witnessed the proceedings. The agreement was carefully explained, and was fully understood and assented to by the Indians.

GEO L. TYLER,
Captain, Second United States Cavalry.
CHARLES F. ROE,
Lieutenant, Second United States Cavalry.

We, the undersigned, members of the Crow tribe of Indians, were not at the agency at the time of the council, but, after having the articles of convention fully explained to us, do hereby give our assent to the same.

The Deaf.
Crooked Face.
Little Face.
Split Ear.
Kill the Chief
Plenty Elkhorses
Boy Chief, Taboo
The Buffalo.
Burnt Arm.
Buffalo Calf.
Brown Beaver.
Small Pony.
Small Boy.
White Bull.

The Sergeant.
The Blind.
Chief Bull.
The Bravo.
Eats a horse.
Medicine Chicken.
Long Hour.
Crow Head.
Arm in his neck.
Small Bear.
White Otter.
School Teacher.
White Calf.
Bull on top of the mountain.
Big Pond.
The Magpie.
Pretty Bird.
The Gooseberry.
Musk Rat.
Shoots well.
Young one in the mouth.
Sitting Weasel.
Pretty Robe.
Four Chiefs.
Sharp blade sword.
The Deer.
Cloudy Forehead.
The Knife.
Black Face.
Long Fingers.
Blind Horse.
Flying Eagle.
Calf Woman.
Pretty Bull.
Black Dog.
The Winking Eye.
Young Horse.
Sewed side.
Pretty prisoner.
Kill the Chief.
Plenty Elkhorses.
Boy Chief, Taboo.
The Buffalo.
Bad Snow.
Old Cloud.
Yellow Fender.
The Swan.
Pretty Side.
Yellow Bull.
Sharp Nose.
Crooked Nose.
The Coat.
Bear From Below.
The Hair.
The Weasel.
Two Tails.
Pounded Meat.
Sister to Crazy
The Dumb.
The Pipe.
Yellow Horse.
Tiger Woman.
Iron Neck.
Medicine Rock.
The Shell.
Splendid Leg.
White Head.
Old Saddle.
The River Bull Woman.
Shell-in-the-Year.
Good Beard.
Little Whetstone.
Otter that knows.
Bird Woman.

Old Blackbird.
White Dog.
Pretty Gun.
Plenty head gear.
Two Lances.
Small Bull.
The Black Bird.
Fat Elk.
Green Meadow.
Old Kettle.
Tall Pine.
Diving Otter.
Friendly Beaver.
Jack Sheppard.
The Throat.
Flat Black.
Black Foot's Son.
The Red.
The Twin.
Yellow Top.
Ra-Hide.
Plenty Head.
Little Wolf.
Rotten Tail.
Red Fox.
The Onion.
Half Yellow Face.
Dog Eye.
Afraid-of-his Eyes.
Little Son.
Yellow Tobacco.
Iron Necklace.
Small Wolf.
Gray Head.
Yellow Head.
Pretty Eagle.
No Heart.
Red Beard.
Blue Moccasin.
Young Wolf.
No Hand.
The Otter.
Show his Face.
Dirty Head.
Takes the Shield.
Two Hours.
The Blind Bull.
White Swan.
Hides-his-face.

We, the undersigned, members of the Crow tribe of Indians, who were at the agency during the sitting of the council, but were not present when the articles of convention were assented to, hereby give our assent to them.

Bad Hand, Blue Leggings.
Ugly Face.
Back Bone.
The Panther.
Sitting Bull.
Little Iron.
Fish Catcher.
Horse Guard.
Scabbed Bull.
The Chicken.

Strong-by-Himself.
The Tail.
Long Neck.
Spotted Tail.
Yellow Top.
Crane in the Sky.
Big Nose.
Yellow Leggings.
Mauntain Pocket.
Old Cloud.
Old Kettle.
Red Face.
Bear Head.
Black Head.
Shake-his-Tail.
Poor Elk.
Big Ball.
Old Tiger.
The Island.
Old Man.
Picket Pin.
Old Tobacco.
Hole-in-the-Forehead.
Crazy Head.
Iron Feather.
Red Fox.
Bird in the Neck.
The Buffalo.
Medicine Rock.
Crooked Eye.
Pretty Bear.
Old Liar.
Kills Quick.
Smart Boy, Great Hunter.

Witness
PIERRE SHANE,
his mark.

I certify on honor that the above names were appended as stated.

F. D. PEASE.

Narrative of the proceedings of the special commission.

Hon. Felix R. Brunot, chairman of the special commission to negotiate with the Crow tribe of Indians, under act of Congress of March 3, 1873, accompanied by Thomas K. Cree, as secretary, arrived at Bozeman, July 7.

Arranged with Agent Pease to have the Mountain and River Crows brought to the agency as soon as possible.

July 28. — General E. Whittlesey, of Washington, and Dr. James Wright, late superintendent of Indian affairs for Montana, members of the commission, arrived at Bozeman.

August 30. A conference of the commission was held at Fort Ellis. The chairman read the letter of the honorable Secretary of the Interior, dated May 14, authorizing the commission, and the letter of the honorable Commissioner of Indian Affairs, of May 29, giving instructions for the guidance of the commission in its negotiation with the Crows. Also, the treaty at Fort Laramie, made with the Crows, May 7, 1868. The commission had a free conference in regard to the objects sought to be attained.

Having learned that the parties sent out for the Mountain Crow Indians, after thirty-three days' absence, had found them, and had reported that they were *en route* for the agency, and that a portion of the River Crows had already arrived, the commission decided to leave for the agency the next day.

July 30.—Left for the Crow agency. Arrived at 9:30 p.m. Blackfoot and a few of the principal men who had come in from the camp were waiting to see the commission.

Aug. 1.—This morning some twenty of the prominent chiefs, under Blackfoot, called to pay a formal visit to the commissioners. They came in singing a song of welcome "to the commissioners from the Great Father," and, after shaking hands and embracing the great white chiefs, the following conversation occurred:

MR. BRUNOT. We are very glad to see you. We have been waiting for some time at Bozeman. We want to see all the Crows. The Great Father sent us and told us to talk with all of you. We want to know where your camp is, and when all will be in.

BLACKFOOT. They are camped on the Yellowstone, at the mouth of Alder Creek, about forty miles away.

MR. BRUNOT. How many days is that away?

BLACKFOOT. We can't tell how many nights; six or seven, perhaps.

MR. BRUNOT. That is a long time for us to wait.

BLACKFOOT. Our horses are poor; it is warm weather, and the horses have given out; all the streams are high and hard to cross; they sent us men ahead to meet you. Last summer you came and sent to see the tribe, but before we got here you had gone. This time I came ahead because I wanted to see you.

MR. BRUNOT. If they come as soon as they can we will wait. Can the camp be here in five nights?

BLACKFOOT. I do not think they can get here so soon. Do not be in a hurry; we want to see you. the streams are high, and our horses poor, but we will come as soon as possible.

MR. BRUNOT. I waited a long time for you last summer, and the Great Father was sorry you did not come. It is a long journey from Washington; it would take six months on a horse to go there, and now that we are here we want to see you, and if the camp comes as fast as it can we will wait.

BLACKFOOT. To-morrow I will go to the camp, and bring them as soon as I can. We do not know how long it will take, but we will bring them as soon as we can; we did tell them that you were in a hurry.

MR. BRUNOT. That is well.

BLACKFOOT. You have sent for us; we had not gotten skins enough, and were not through our hunt, but we came at once.

MR. BRUNOT. How many lodges have you?

BLACKFOOT. We do not know how many; there

are about 400 lodges, but some are River Crows, Bannocks, and Nez Perces.

MR. BRUNOT. Where did you meet the Sioux?

BLACKFOOT. Across Prior's Creek, about twenty miles, at the foot of Prior's Mountain, we met the Cheyennes and Sioux. They were coming this way; they were a big party. The most of them did not come to fight, but a small party met and fought us, and we killed one of the Sioux. From there we went after them. We had plenty of ammunition and were friends of the white men, and we followed them down the Big Horn. There is a large party at Fort Smith; when they found we were coming they went back. The Big Horn was too high for us to cross, or we would have followed them and driven them from the country. On Warm Spring Creek, across the Big Horn, we fought and whipped them, but could not get over the river after them. The Crow soldiers wanted to cross, but the camp could not go without danger of drowning some of our people and ponies, but we sent scouts, and they brought back horses taken from the Sioux camp. The Sioux camp was between the Big Horn and Little Horn; we sent six of our men; they brought twelve Sioux horses. When they came back we sent two more. They found a Sioux out hunting; they killed and scalped him and got his horse; when they came back they found us camped at Pompey's Pillar.

Three Nez Perces went out from there and took five horses and mules from the Sioux. We sent two more men; the Sioux camp was at the mouth of the Little Horn; it was a big camp; five rows of tepees. They got some horses, and shot into the Sioux tents. From Pompey's Pillar we came to Prior Creek, and there Boyer (the messenger) found us. He came through near the Sioux camp, and just afterward we

had the fight with the Sioux—just at the mouth of Prior Creek. The party was so large they came right up to our camp and attacked us. The big valley on Prior's Creek was full of Sioux Indians. Boyer will tell you the same. The white men who were with us took their guns and went out with us to fight the Sioux. Another party went from Prior Creek after the Sioux. When we came to the Stinking Water three of them had been killed. We knew you great white men who were coming from the "Great Father" to see us would hear whether we whipped or not. We began to fight when the sun got up; we fought them till noon, when the Sioux began to run; we followed them to Fly Creek, nearly sixty miles.

The Sioux must have good white-men friends on the Platto and Missouri. They get guns and ammunition; they are better armed than we are; they have Winchester, Henry, and Spencer rifles and needle-guns. We took some of these guns from those we killed; we took two Henry rifles and one needle-gun; they threw away their blankets and saddles, and we got a number of them; they threw away their ammunition. Their outfit was better than ours. We got needle, Spencer, and Winchester cartridges, and powder and balls from them. The Great Father does not know that the Sioux get these arms and ammunition, and then they kill white men with them. The Crows do not kill white men; the arms and ammunition we get is to hunt with, and defend ourselves and our white friends with.

When the fight was over we intended to go to Heart Mountain, where buffalo were plenty, and get skins for our lodges, but we did not go then.

We came here to shake hands with you; and we want you to think well of the Crows. We mean to do right, and we will listen to what you say to us. We

want you to know how the Sioux trouble us. There are many Sioux, but we are not afraid of them. They want to come on our land, but we intend to keep them off. I love you and hold on to your hand, but the Sioux we want to fight. We will stay here to-day, and to-morrow we will go to the camp. Too many of us cannot leave the camp at one time for fear of the Sioux. Even at the agency we watch for the Sioux. We brought a good many guns with us, and the camp is short that many. The Sioux want to get our country, but we will not let them have it.

MR. BRUNOT. The Great Father does not give the Sioux any guns. I do not know where they get them. We know the Crows are our friends; that is the reason we come here; and we want you always to continue our friends; what we say is for your good. I have to go to see the Utes after I leave here. The Ute chief met me on the way. He heard what the Great Father wanted them to do, and they are going to do it; and so with nearly all the Indians, they are going to do as the President wishes them.

After awhile, if the Sioux do not do as the President wants, he will make them do it. Since the President's war is over he has plenty of soldiers, and he intends to make everybody—red men, white men, and black men—do what is right. He is going to made them all do it, whether they want to or not; but he does not think the Crows want any soldiers, for they are his friends and will do what is right.

Is Long Horse with the camp? I saw him last year.

BLACKFOOT. Yes; his brother was killed in the fight.

MR. BRUNOT. We came in a wagon, and could not carry any presents with us, but we want you to have dinner with us. How many chiefs are here?

BLACKFOOT. Twenty-two Mountain-Crow men;

and nine River Crows.

MR. BRUNOT. We want the Mountain Crows to-day, and the River Crows to-morrow.

BLACKFOOT. The River Crows belong to me, and I want you to treat us all alike.

MR. BRUNOT. This is our dinner, and we want you all to come to-day.

BLACKFOOT. Are there any cattle above the canyon on the river?

MR. BRUNOT. Yes; I saw them there. Those cattle are on the wrong side of the river.

MAJOR PEASE. They ought all be taken off, and the miners too. I ordered the herders to move the cattle farther up, or else across on the other side of the river.

MR. BRUNOT. Major Pease has ordered them to take the cattle away. The country up there is not good for much; there are many mountains.

BLACKFOOT. The country is good, and we like it. It is our country, and we know it is good.

MR. BRUNOT. I know it is your country. Where is the best country you know of for Indians to live on?

BLACKFOOT. (after much discussion.) Why did you ask that question?

REPORT OF COMMISSIONER OF INDIAN AFFAIRS

MR. BRUNOT. I want the Crows to have the best country, and I want to know where it is. I do not want any of your country for myself.

BLACKFOOT. I am going to tell you, but we are not ready yet. We have land we like very much, and we will tell you about it when our people come in.

MR. BRUNOT. Some places the white men are in already; other places they are going in; and we want to find a good place that we can keep always for the Crows.

BLACKFOOT. Do not be too fast; wait till all are here. When the rest come in we will tell you our mind.

MR. BRUNOT. You will come for dinner, and then you will go and bring the camp.

AUG. 8.—The Indians arrived to-day. They had been detained by fights with the Sioux, and by sickness in the camp, quite a number having died while *en route* for the agency; Iron Bull and Blackfoot, the two principal chiefs being sick; and Long Horse, an important chief, being in mourning for his brother, who was killed by the Sioux.

Arrangements were made for a council to-morrow.

AUG. 9.—Provisions were issued to-day, taking from 10 o'clock till 5, after which the Indians declined to come into council on account of the chiefs being sick and the hour too late.

Respectfully submitted.

THOMAS K. CREE, *Secretary.*

To the SPECIAL CROW COMMISSION.

Supreme Court, U.S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

No. 79 1128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,
Respondents

V.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTEAD, EARL L. SHERRON JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Certiorari Filed January 21, 1980
Certiorari Granted April 14, 1980

JOINT APPENDIX
VOLUME III — EXHIBITS

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REPORT OF THE COUNCIL

CROW AGENCY, MONTANA TERRITORY,
August 11, 1873.

A council was held with the Crow Indians this morning, There were present Hon. Felix R. Brunot, chairman of the board of Indian commissioners; General E. Whittlesey, of Washington, and James Wright, late superintendent of Indian affairs for Montana, as a special commission under act of Congress of March 3, 1873, to negotiate with the Crow Indians, with Thomas K. Cree as secretary. There were present, by invitation of the commission, General Sweitzer, commandant at Fort Ellis; Captain Tyler, and Lieutenant Rowe, of Company F, Second Cavalry; Dr. Lightfoot, surgeon U.S.A.; Major Pease, agent for the Crows; Nelson Story, esq., of Bozeman, Charles Hoffman; esq., and Mr. Cross, traders; several of the employees of the agency, and the following Indian chiefs and subchiefs:

Of the Mountain Crows—Iron Bull, Blackfoot, Thin Belly, Bear Wolf Show-his-face. Good Heart, Shot-in-the-jaw, Crazy, Bear-in-the-water, Bull-goes-hunting, Crane-in-the-sky, Crazy Sister-in-law, Crazy-head, Long Horse, Old Crow, White Calf, Red Side, Onion, White Month, Bird-in-the-neck, Spotted Tail, Poor Elk, Little Iron, Chief Bull, Old Dog, Bell-rock, Along-the-ridge.

RIVER CROWS — Little Soldier, Wolf's Bow, Hunts-his-enemy, Boiling Leggin, White Rock, Black Bull, Cranberry, Bear-head, Poor Assinaboine, and many others.

In opening the council Mr. Brunot said:

Before we talk about business I want General Whittlesey to ask the Great Spirit to look into our hearts and make them all good.

General Whittlesey led in prayer, asking the God would guide the commission and the Indians in the deliberations of the council, and lead each right.

MR. BRUNOT said: I am glad to meet all my friends here now. I was sorry I could not see you when I came here last summer. I came then to hear what you had to say about yourselves, and to talk to you of what I thought was good for you. I have now come again, and am very glad to see you. My heart is good to you, and I hope you are all well to-day, (many had been sick.) The Great Father sent some words to you when I started to come, and he sent these two gentlemen with me to see you. He told us there was a new general at Fort Ellis, and he also has come to see you. Another man, Mr. Cree, comes with us to write down all that is said by the white men and the Indians. I want you to speak wise words, because they will go to the Great Father. These gentlemen are all glad to see you, and they wish me tell you so. The Great Father has heard many things from this country; some tell him one thing, some another. I see with my own eyes many things I will tell him when I go back. I know he thinks the Crows are all his friends, and he wishes to do what is good for you; and when he told us to come and tell the Crows what he thinks is best for you, it is because he cares for you. I want you to know that every word I say to you comes from my heart. I would not say a bad thing for my own child, nor would I for you, and all I say you will see is true. The Great Father knows that the Crow Indians made a treaty at Fort Laramie. I was not there, nor the Great Father, but he sent commissioners there and some of your chiefs were there; but the treaty is printed, and he gave us

this printed paper. It says, "This is the treaty made at Fort Laramie." I hold it in my hand; it has some chiefs' names signed to it. The names are: Pretty Bull, Wolf Bow, Mountain Tail, Blackfoot, White Horse, Poor Elk, Shot-in-the-jaw, White Forehead, Pounded Meat, Bird-in-the-neck, and The Swan. These are the names of the chiefs that signed the paper. That treaty says where the Crow land is to be. I think it is a good country. It is along this river about seventy-five miles above the agency, and then goes toward where the sun rises until it crosses the Big Horn, and goes half way between it and the mouth of the Rose-bud River, about twelve miles this side of Porcupine Creek. This is what the treaty and the map say. That is the country that belongs to you forever, or until you wish to sell it. Now, the country across the river, where you go to hunt buffalo, the treaty says, you can go to while the buffalo are there; but when the game is gone away from there that is all to be white man's land. The Great Father has heard that the country southwest of here is not of much use to the Crows, and that the whites are going into it. I have seen some of it along the river, and I think it is very good; but some of it is very rocky and mountainous. It is good only for people who wish to hunt gold. I have seen white people going past the reservation to Clark's Fork; I am sorry to see them going there. I do not want to see white people go upon Indian land so long as it belongs to the Indians and they want to keep it. The Great Father at Washington does not want whites to go upon land that belongs to the Indians. He has heard that the whites have gone there, and he thought, to prevent any more trouble, that the best thing for the Indians to do was to sell that land. So last winter when the Great Father's council came together and heard about these white people being

on the Indians' land, they passed a law to send out men to ask you whether you would sell these lands. This law says—

"That the Secretary of the Interior be, and he is hereby, authorized to negotiate with the chiefs and head-men of the Crow tribe of Indians in the Territory of Montana, for the surrender of their reservation in said Territory, or of such part thereof as may be consistent with the welfare of said Indians: *Provided,* That any such negotiation shall leave the remainder of said reservation in compact form and in good locality for farming purposes, having within it a sufficiency of good land for farming and a sufficiency for water and timber; and if there is upon such reservation a locality where fishing could be valuable to the Indians, to include the same if practicable; and the Secretary shall report his action in pursuance of this act of Congress at the next session thereof, for its confirmation or rejection."

He says the men must not buy anything from the Indians if it is not good for you to sell it. The Indians must keep plenty of land for themselves and their children to live on. The land they keep must be good for them to farm and must have a good place for an agency, and it must be good for them. That is one thing the Great Father told us to say to the Crows, and it is for you to think about. This treaty, after awhile, comes to an end. You always have the land, but in thirty years the annuity goods stop. It says all who stay upon the reservation must be fed for four years. I am sorry it is not longer, but that is what the treaty says. Suppose the white men continue to come into the mines; they get too numerous, and after awhile there may be trouble between them and the Indians. I hope the trouble will never come. I want, as long as I live, if I choose to come here, to

have the Crows take me by the hand and know I am their friend. When many men think one way and many think another way, it is best to talk it over and see if all will not come to think alike. I think this is best. The Crows do not care about digging in the mines. It would not be good for you to do so. If you can sell to the Great Father the piece of land that has the mines upon it, he will put away the money and for it send useful things to you every year. That is what I want you to think about. The Great Father is making an iron road that is coming along the river. It will make it very easy to bring things to the Crows and the people who live in this country. Sometimes the Great Father sends the goods to the Indians; they start them in the spring, but they do not get here until the next spring. They ought to come before you go upon your fall hunt, that you may have everything with you. When the railroad is done the goods will come quick. Perhaps he will make the railroad on the other side of the river, perhaps on this side; I do not know which. This side is Crow land. You can say whether you want it on your land or not. You can think about that. If you sell a part of your land you must have a better place than this for an agency. We want to help you pick out the place. You will think about that too. I have said enough; now I want to hear you talk.

Several Indians here came forward and presented buffalo-robes, and two presented pledges, each representing a horse, to the members of the commission. The commissioners demurred at accepting the presents, but were assured that the Indians would be offended if they refused. The commissioners then accepted them, but afterward gave them away to needy Indians.

MR. BRUNOT. I have been to see many tribes of

Indians. I go to see them because I want to do them good. Some places the men, to show that they are my friends, bring me something which they wish to give me. I always tell them I do not come to get anything from them; that I have plenty myself, and I do not want to take anything that is of use to them; and now the Crows have come, and to show that your hearts are good to us you have given us these robes. I have let you do so because it is your way, and I do not want to do anything but what is kind and right.

BLACKFOOT. When we see our friends we give presents to each other. My father comes and sees me; he gives me something and I take it. We give you something and you ought to take it.

MR. BRUNOT. A long time ago, when men wanted to get anything from the Indians they brought a great many presents. It was because they wanted to get something away from them. If I come to the Crows and bring you a lot of presents you will think I want to get something away from you (To the whites: We prefer that what is said should go to the Indians through the interpreter, and we do not want others who talk their language to talk with them about what is said.)

OLD CROW. I give you a present. We want you to take the sickness away from us.

BLACKFOOT. You call the Great Spirit Jesus in your language; we call him in the Crow language E-so-we-wat-se. I am going to light the pipe and talk to the Great Spirit. (He lighted the pipe, and, looking up reverently, said:) "The Great Spirit has made the red man and the white man, and sees all before Him to-day. Have pity upon us! May the white man and the Indian speak truth to each other to-day. The sun that looks down upon us to-day, and gives us light

and heat, sees that our hearts are true, and that what we do is good for the poor red man. The moon, that shines on us in the night-time, will see us prosper and do well. The earth, on which we walk, from which we come, and which we love as our mother — which we love as our country — we ask thee to see that we do that which is good for us and our children. This tobacco comes from the whites; we mix it with bark from the Indian trees and burn it together before Thee, O Great Spirit! So may our hearts and the hearts of the white men go out together to Thee and be made good and right."

As he invoked the Great Spirit, the earth, &c., the pipe was reverently held in the direction of each, and, after this, was presented to the commissioners and then to the chiefs to smoke, after which ceremony Blackfoot said:

BLACKFOOT. I am going to have a long talk with you. My Great Father sent our friends to see us. We see each other; that is good. You came here last summer; we were sent for to see you. We were back of the mountains when we heard of you, but high waters and the mountains prevented our coming. You said you did not see us, and you were sorry for it. We could not come any faster. This summer we were on this side, near the Yellowstone, where we were getting skins to make lodges. In the fall the traders will want our robes. We will then go over the Yellowstone to Judith's Basin to hunt. Since I was a boy I recollect that is what the Crows always did. When the Crows meet a friend they always give him something; so we do with you. You say you have a book that tells about the Great Spirit. We always give the Great Spirit something. I think that is good. We see the sun, we give him something; and the moon and the earth, we give them something. We beg them to take pity on us. The sun and moon look

at us, and the ground gives us food. You come and see us, and that is why we give you something. We are men like each other; our religion is different from yours.

The old folks are dying off; then who will own the land? I went to Fort 'Laramie; the old Indians signed the treaty. We came back to the camp and told the young men, and they said we had done wrong and they did not want to have anything to do with it. They said, "We love the Great Father, and hold on to the hands of our white friend. All the other Indian tribes fight the whites; we do not do so. We love the whites, and we want them to leave us a big country."

All the other Indians go and talk with the Great Father; you take them to Washington; they are bad; they hide their hearts; but they talk good to the Great Father, and you do more for them than for us. This I want to tell you; yesterday you spoke to us and we listened to you. If you wish to have peace with all the Indians get them all together and make peace. Than I will make peace with them, too.

The Great Spirit made these mountains and rivers for us, and all this land. We were told so, and when we go down the river hunting for food we come back here again. We cross over to the other river, and we think it is good. Many years ago the buffalo got sick and died, and Mr. Maldron gave us annuity goods, and since then they have given us something every year. The guns you gave us we do not point at the whites. We do not shoot our white friendss. We are true when we look in your face. On our hands is no white man's blood. When you give us arms to go and fight the Sioux we fight them to keep our lands from them. When we raise our camp and go for buffalo some white men go with us; they see what we are doing; they see that we jump over the places that are

bloody. On the other side of the river below, there are plenty of buffalo; on the mountains are plenty of elk and black-tail deer; and white-tail deer are plenty at the foot of the mountain. All the streams are full of beaver. In the Yellowstone River the whites catch trout; there are plenty of them. The white men give us food; we know nothing about it. Do not be in a hurry; when we are poor, we will tell you of it. At Laramie we went to see the commissioners. Now commissioners come to see us, and we listen to what you say. The commissioners told us at Laramie if we remained good friends of the whites we would be taken care of for forty years. Since we made that treaty it is only five years. You are in a hurry to quit giving us food. I am a young man yet; my teeth are all good. They told us at Laramie we would get food till we were old, and our children after us. This is not the place for the agency, on this point of rocks. We would like to know who built the agency here. They told us they would give us our food. They promised to send a good agent and good traders, and if they were not good they would be taken away. Pease never treated us wrong; the young men and the children he always treated right; all that was sent for us he gave us; he was not a thief; he treated us well, and we do not want him to go away from us. On Sheep Mountain white men come; they are my friends; they marry Crow women, they have children with them; the men talk Crow. When we come from hunting we get off at the doors, and they give us something to eat. We like it. We raised Shane, (the interpreter;) he was a boy when he came here. You ask us what we have to say, and that is what we tell you. Here is the doctor; when our people are sick he doctors them. He has two children by a Crow woman; we like him. Here are our traders; when we go hunting they give us ammunition; they gave me a

revolver to kill buffalo. We do not know anything about Cross, (a new trader) we do not know his face. We want the soldiers at Ellis to take the part of the Crows. When they come here to see the giving of annuity goods we give them robes to take with them, and when they hear bad talk about the Crows we want them to speak well of us. When we camp here some of the whites run off with our horses into the mountains. We know about it, but we do not say anything. We have a strong heart, as firm as a rock, and we say nothing about it, but you want to hear what we have to say and I tell you. In Gallatin Valley the Cheyennes, Arapahoes, and Sioux made a raid and the people blamed the Crows with it. We want them to quit speaking bad about us. On the Missouri River the whites have married into all the different Indian tribes; their brothers-in-law, the white men, come here and steal our horses. We follow them and find who have them. Some of the Crows went to the Missouri River and got some Crow horses. The white people sent word they were their horses, and we sent them all back. We claim our horses, but they are not brought back.

When we set up our lodge-poles, one reaches to the Yellowstone; the other is on White River; another one goes to Wind River; the other lodges on the Bridger Mountains. This is our land, and so we told the commissioners at Fort Laramie; but all kinds of white people come over it, and we tell you of it, though we say nothing to them. On this side of the Yellowstone there is a lake; about it are buffalo. It is a rich country; the whites are on it; they are stealing our quartz; it is ours, but we say nothing to them. The whites steal a great deal of our money. We do not want them to go into our country. We would like needle-guns to get game and fight the Sioux; this we tell you.

MR. BRUNOT. Blackfoot says he wants the soldiers to speak well of the Crows. I will tell him what took place last summer. When I came here, white men in the Gallatin Valley told me the Crows had killed two white men, and took their horses. I did not believe it, but I wanted to find out. I went to the soldiers and asked them about it; they said it was not the Crows. So the soldiers did speak for the Crows, and as long as the Crows do well the soldiers are their friends. Afterward I found out who killed the men and took the horses; it was Arapahoes and Cheyennes. I wrote a letter to tell the governor who it was. I think he will put it in the newspapers, and everybody will know that it was not the Crows. Blackfoot says the white people are digging in the mountains, taking away your gold. I know that myself; I saw them go there. I told them it was not right. The Great Father has heard about it; and he has said the Crows had better let the people have the gold, and he will pay you for the land. The Crows have done well. You have not hurt the white people who are on the reservation and in the mines, and you tell us you are the white man's friends. The Great Father does not want any of these whites to hurt the Crows. He says for us to tell the Crows that if you let the white people have the land he will give you things you need for many years. I have been looking about over your reservation. I see you do not go much where the mines are. I think it would be good for you to let the white people have the land, and the Great Father for many years will give you what you need for yourselves and your children. I do not want this on account of the people who are on your land, but I think it will be good for you and your children. It is your land, and you can do what you please with it. If you want to keep it, I have nothing to say, but I think it would be good for

you to sell it.

Blackfoot said he went to Laramie, and, when he came back, the young men did not agree to what he said. I do not want that to occur again. Whatever the chiefs do, I want the young men to know all about it, and to agree to it, and then no one can say it was wrong. You must think about this, and be sure you are right. It is your business; it concerns you, and you must do what you think is best. If you decide to sell the land from Clark's Fork to the Yellowstone, we will talk about what the Great Father must give you for it. If you do not want to sell so much, you can fix some other line. That you will think about yourselves, and will tell me what you think.

BLACKFOOT. I do not want whites to go to Heart Mountain.

MR. BRUNOT. The upper part of Clark's Fork is not on the reservation.

BLACKFOOT. I do not care so much about the part on the Yellowstone and in the mountains, but above in the valley, it is good. I am going to tell you I treat my friends good. When you speak to me I say, yes! yes! yes! Along the Muscle-Shell and Teton Mountains is Judith Basin. Many men go into that country wolfing; they kill game. We thought, when we saw them, that white men are giving us food; when we have to buy what we want, they will be ashamed when they see us. When we have a friend we take him to our tepes. We give him a robe to cover himself. When we meet a wolfer, if he is poor, we give him a pair of pants and moccasins, or a blanket. We shake hands with him, and send him away all right. We would like them to quit wolfing; there are getting to be too many of them, and we want them to quit. (The commissioners examined the

map.) What have you decided about on the map?

MR. BRUNOT. We were looking at the map to see where was a good line, if the Crows decided to sell the mountain part of their reservation. Some people think it would be best to sell from the mouth of Clark's Fork up to the Yellowstone; others think it would be best not to sell so much, but to take some other line this side of that; but it is for you to make up your mind how much you will sell, or whether you will sell any. It is your land; you can do as you please about it.

We have told you what the Great Father wants you to do. I have told you I think it would be good to let the miners have the mountains where they are, and where they are going, and for the Great Father to pay you. I think it would be better for you and your children; but, if you do not think as I do, it is all right.

BEAR-WOLF. These are old men, (the chiefs.) We are young men; we are just grown up; we do not want to sell any land.

IRON-BULL. You are my friends.

Here he was interrupted by the arrival of a mourning people. Long-Neck, whose brother was killed in a recent fight with the Sioux, with his squaw, came in weeping; he placed his hands on the head of each commissioner and sang a mourning song, all the Indians looking solemn, and some weeping.

LONG-NECK. My brother is killed by the Sioux; I want to revenge myself. I come to ask you to give me good luck.

After the mourning party had gone Iron-Bull said: We are tired. I will say a few words and quit talking for to-day. Look all around us! There is no white man's blood; we do not set our feet upon his blood. When you gave us flour did we ask for it? Did we

ever ask for sugar of beef? What made you give it to us? We never asked you to give us pants and stockings. You have not asked me to say what I am now going to ask you. I have asked why food is given us, and I was told we were getting food because we were friends of the whites. We like the food; do not quit giving it to us when four years are up. Here is our agency; we were looking for a white man to take charge of it. We know Pease's face. All the people, old men, young men, women, and children know Pease. If you put anybody else here as agent we will not feel like living here any more. We do not want Story and Hoffman, our traders, to go away. There is a tall man in the store called Cross; he makes bad faces to us; he is a hard man; we do not know him. I am not a fool. I am the Iron Bull! I love all white men. The Sioux, Cheyennes, and Arapahoes do not like the whites; if you do not know it, I tell you so. The whites have no horses on the Sweet-Water or in the Gallatin Valley; and over to the Missouri River all their horses are in the Sioux camp. All about they have killed white men and scalped them. If you like us, do not give the Sioux any ammunition or guns. Do what I ask you. Let people keep their cattle on the other side of the Yellowstone. The whites would like to move on our land; do not be in a hurry. Here is a good place to farm, and there is wood on the mountains. You saw that man who came here and cried. The Sioux killed his brother, just as they would you or me. Have pity on us and take the sickness away from the Crow camp. when we raise camp we will go for buffalo; we will make a medicine lodge near the lake. If we come back and nothing happens, we will be glad to see you. When we raise camp we want you to give us ammunition to defend our camp. A long time ago a peace commission sent for me to the Yellowstone. I went with Shane, (the in-

terpreter;) they gave me blankets. I could blow through them, and they went to pieces; they gave us nothing that was good. I asked them to do something for us. They said "Yes," but they have done nothing for us. There are plenty of buffalo yet. The soldiers went down the other side of the Yellowstone; we said nothing because we loved them. When there is no game for us to eat, then we will come and tell you about it.

MR. BRUNOT. One thing I want you all to understand. You say you want Mr. Pease for agent. You know his face and like him; so do I, and I think the Great Father likes him, too. The Great Father, when he has his men, he puts them where he wants them to go; he puts them where he pleases. General Baker was over at Fort Ellis; the Great Father took him away and sent another man there. When I came here I knew Major Pease was here; these gentlemen knew Pease was here, and that is all we know about it. If the Great Father wants to take him away you must think it is all right. Major Pease is your friend and will always be so. If the Great Father sends anybody else, that is for him to do as he wishes. He did not tell me anything about it. But if the Great Father sends a new agent or trader, you must try them and see if they are good. If a man comes who does not do right, tell the Great Father, and he will send another man. We have nothing to do with it. You are all tired, and you want to talk among yourselves about what has been said, and I think we had better stop. We will meet to-morrow and have other things to say, and we want you to talk about it and tell us what you have to say.

LOW HORN, (taking Pease and putting his arms about him.) We love him, and want to keep him. We all love him, and want him to remain with the Crows.

MR. BRUNOT. When I talk to the Crows I mean all — the River and Mountain Crows both. I think if a man has a family it is good for all of them to be together, and not divided up. I think the River Crows ought to stay with the others; you ought all to be one family. I thought all the River Crows would be here, but some have not come. I hope you will all be friends together. We are very sorry for your people who are sick, and for those who mourn. We cannot help it. The Great Spirit does everything; but we will ask the Great Spirit to take the sickness away, and I hope he will make you well. That is all we will say to-day. To-morrow morning, at nine o'clock, we will meet in council. What you have said has been put on paper, and will go to the Great Father. There are some things I do not speak of, because I do not know about them, but all I do say is true. I will take your words to the Great Father, and he will do as he pleases. I want you to talk among yourselves, and tell us to-morrow what you will do about your land. When I came away from Washington I did not bring any presents, because I thought if I came to the Crows bringing a lot of presents you would think I would take advantage of you. But now that we are here and see you, we think we would like to give you something. We have to do the best we can. We have a few blankets we wish to give you. We give them to you to show you that we are your friends, the same as you showed us when you brought the robes to us.

Fifty blankets were then distributed among the chiefs and head-men; after which the council adjourned.

Second day:

AUGUST 12, 1873.

The council convened at two o'clock. Blackfoot made a long speech to his people, telling them of the number of whites that are coming into their country and going into Judith's Basin, eating the game, and their stock eating the grass on which the buffalo and antelope, the Indian food, feed.

The council opened with prayer by General Whittlesey.

MR. BRUNOT. I do not wish to say the same things I did yesterday. I think you heard them all, and have thought of them, and are ready to say something in regard to the business of which we talked. We have been thinking about it, and so have you. Now you have something to say about it, and we are ready to listen. The business about the land is yours more than it is anybody else's. If a man has a great thing to think about he does not mind little things; if he sees the sun, and can look at that, he does not want to look at a little camp-fire. Some other time he will look at the little things; so now we will talk of the great matter, and some other time we will talk of the little things.

BLACKFOOT. What men say one to the other is good. Look at me. I am a big man. I have a big heart, and what I say is true. The whites have been digging gold at Emigrant Gulch for ten years. Perhaps the white men think the Crows do not know it, but we do know all about it. Above Emigrant Gulch I hear the whites have found other diggings. I love the Great Father, and I love my white friends. I will talk to you. The whites have been stealing our property. We are men, and know of it, and we will some day ask for the pay for our gold that the white men took from us. We used to get up the Yellowstone, and cross to the lake, and go through to Heart Mountain on the Stinking Water. That was

our country. This summer we intend to go to Heart Mountain to get skins for our lodges. One time on Big Rocky (Rosebud) our camp met a wagon and white men with it. Four chiefs went and shook hands with the white men. The white men pulled out their revolvers and shot one of the Crow chiefs and killed him, and shot another who got well. When we heard of this we cried; we though much about it, and then tried to forget it, because the white man was our friend.

Mr. Brunot. When was that?

Blackfoot. When General Sully first came into the country to fight the Sioux, (1862.) We do not understand you about the country. We understood Heart Mountain and Stinking River were in the Crow reservation, but you say it is not. Above the canons they have been digging gold; now the whites want to take Heart Mountain, and we do not understand it. From Emigrant Gulch on this side we do not want to sell; above it we will sell you. We go to Judith Basin in the winter and locate on the creeks. The buffalo and antelope are ours. The whites kill them and put poison on them to kill wolves; they kill our horses with their poison. We say it is all right, because we love the white man and hold on to his hands. We are now telling you what we think. Dr. Hunter went down the river to the Warm Spring and located himself down there. I want you to hear and believe what I say. When we go for buffalo we find trappers hunting all over our country and men going everywhere on it. They think we do not know of it, but we do. White men who have married our women are stopping here for the Crows. When we kill our enemy, one who is hostile to everybody, the whites ought to be glad. A long time ago young White Bear, an Indian brave, and a white man, his friend, went together to fight the Sioux. They fought side by side. The white

man was killed. Did the red man run away? No; he fought by the side of his white friend; and avenged his death. They fought hand in hand; and so they died. The bones of the red man and white are now mingled together. That shows we are friends of the white man; and as the red man and white man died, hand in hand, so ought we to live.

Right close to the agency this year Dr. Frost, a white man, and two Crow women were killed by the Sioux. The white man and the red women died together. That is why we want to war against the Sioux. The white men did not avenge the death of the white man, but we avenged the death of both the white and the red people. We think, when we died together as friends, we ought to live together as friends. We say, yes, yes, to what you say, and we wish to do what is best for both whites and Indians.

What we were told at Laramie I have in my heart. They told us to look out a white man with a good heart for our agent. We have found him. Here he is in Pease. He does not drink whisky; he likes us. He does not offer us whisky, and we like him. Pease never made any Indians mad at him; the children all like him; he is kind to all of us. What we ask you to do is to permit him to stay, and then we will listen to what you say. You come to hear what we have to say. I tell you, up above, on the river, the whites are digging gold. You can buy that country for the whites. We do not hide anything; we are men. From Emigrant Gulch to the Forks you can have; below it you cannot. I am a man, and that is what I say. We do not want a railroad along side of the river. What do you think about it? We do not want Pease to go away. We never hurt a white man, and we can always look in the white man's face and shake hands with him. The Nez Perce's Indians made peace with us, and they like us. The Bannock Indians shade

hands with us, but they do badly. You should talk to them. When we went to Laramie the commissioners asked us to make peace with the Snakes. We did so and love them; we know and like Wash-a-kie, and we made peace with him. If you count the Crows there are fourteen hundred men. We would like you to give us guns enough for them, and plenty of horses, and to give us food for all time, as long as there are Crows, and that is what we want for our piece of land.

CRAZY SISTER-IN-LAW, (a chief.) We do not want Pease to go away. My boy does not want him to go away. He gives you a horse (to the commission) to keep Pease here. (He gave the commissioner a stick as a pledge representing a horse.)

Mountain Chief's daughter and Crazy Sister-in-Law's little daughter presented robes, saying, "We want Pease to stay with the Crow tribe." All the children gathered about Major Pease to hold on to him.

The council here adjourned unceremoniously, after which—

WHITE MOUTH said, "Blackfoot did wrong in sending everybody away from the council. I do not feel right about it. I thought the council was going to be a good one. We cannot help it, but we do not like it."

Other Indians came forward and said they had nothing to do with breaking up the council. Plenty of others wished to talk, but Blackfoot did it all.

Council re-assembled at five o'clock. Iron Bull, head-chief, being sick, did not return.

MR. BRUNOT. Do any of you want to talk?

BLACKFOOT. You asked us to come back and now we want to hear what you have to say.

MR. BRUNOT. We are glad to see the chiefs back,

but we would like to see more of the young men, and hope more will come. I want to talk a little about what Blackfoot said, and about some other things. I want to talk as I always do, true and straight. I don't want my words to be like the winds that go off and are never seen again. I want them to go into your ears and into your hearts, and if you do not hear them now, some day you may be sorry for it. I want you to remember all I say, and some day you will say, that white man told us the truth. When a man sees the whirlwind coming, does he tell it to stop? No! He gets out of the way; he cannot stop it. A wise man looks ahead; he sees what is coming and he gets ready for it. I see what is coming over this country. I know what is good for the Indians, and I want you to know it, too. I have been on the Platte, and on Wind River, and on the Missouri, and away to the ocean, and what do I see? You do not see it, but I do. I see the white man's towns coming further and further; they are almost here. A few years ago, where these towns now are, there were buffalo. The buffalo used to be on the Platte, as they are now on the Big Horn and Powder River. They are all gone now. Why are they so plenty here still? They have been driven from there and have come up here. The Sioux cannot find any buffalo on the Platte, so they come up north to hunt them. If the Crows went to the Platte and the Republican, they would not find any buffalo there. They have come up here. And when they are killed off here, they will be all gone everywhere. Buffalo are the Indian's bread, but they are going away, and soon will be all gone, and the friends of the Indians want them, by that time, to have something else. We want you to have lands that you can keep, so that you will have plenty to eat; we want you to teach your children so that they may live on white man's food. These Indians who

have eaten white man's food know it is good. When you went to Fort Laramie you made a treaty with the white men. I was not there, but here is the paper that tells me what the treaty was. It says, "The Crows shall have a piece of land always." I t is for you and your children. That piece of land was marked on these maps. Some of you think it was larger than it is. I do not know who told you that. It was wrong; it was a mistake. If the Crows think the land is not large enough, I am sorry; but I see how hard it is to keep this piece of land for you. Some of it has the gold mountains on it. I see wherever gold mountains are, there white men go. They ought not to come here for it; it is not their land. The Great Father does not want them to come on the Crow land, but he is a long way off; he cannot see with his own eyes into the gulches and mountains. He has heard about the gold mountains and the people in them. He has also heard that the Crows do not go into the mountains much, and he thinks if the whites go into the Crow mountains, the Government ought to pay you for the lands. If the land goes away from you, by men going here, there, and everywhere, after a while it is all gone and you have nothing for it, but if you sell the land and let the people go into it, and the Great Father pays you for it, year after year, you will get things you need, and have them always. You will get them after the buffalo are all gone. The Great Father is making the railroad. It is like the whirlwind. I cannot stop it; nobody can. I might as well try to stop the Yellowstone with my hand. I cannot do it. The Sioux thought they had stopped the Great Father's soldiers last summer. The Great Father told the soldiers when they went there, if they met the Sioux and they made trouble, to come back, till they could talk about it, and now there are more soldiers coming this way than all the Sioux

warriors number, and they are going to put a warhouse on the border of the Sioux country, at the mouth of Powder River. You have not seen many of the Great Father's soldiers here; very few. But away to the east there are many thousands of them.

Now, about this land. I told you the Great Father wants to give you pay for it, and have you sell the mountains at this end of your reservation. It belongs to the Crows, and the Great Father does not want it to be taken away without your getting pay for it. Blackfoot talked about selling a little piece at the upper end. Suppose we were to say that will do; we will pay for that little piece; it would do no good. Here are mountains that people are going into now, and the same trouble would come again. Is not that so? I want to tell you another thing about the treaty, and I want you to know that it is not I who say this, but it is what the treaty says. I am going to tell you what the paper says. The Crows have for their lands always what is marked on this map, (showing the bounds of the reservation on the map.) Here is Crazy Mountain on the River; here is Judith Basin; here the Missouri. The treaty says this is the land of the Crows forever, (marking reservation.) Then it says as long as there are any buffalo, and as long as the white men are not here (in Judith Basin) with farms, they may go there and hunt. So on Tongue River and Powder River; you can go there. Blackfoot says white people are going into Judith Basin. The treaty does not say that whites dare not go there, but the treaty says Indians and whites both can go there. I never was in Judith Basin, but I have heard of it, and I have heard that it is a better country than this; that it is good for grass, and that there is plenty of water, wood, and game. I know the railroad is not going there, but that it is coming along here. I think if the Crow Indians could have Judith Basin

instead of this, so that they would own it, and could come out and hunt here, it would be good. The way it is now, the Crows, the white men, and any other Indians can go there, but other Indians cannot come here without the permission of the Crows; but if the Crows had that for a reservation, the whites dare not go there at all, and other Indians could not go there with the Crows permitted them to do so. But the Crows could come here and hunt as long as there is game. That country there is not as large as this country here, but the country all around it you could go to all the same; but, because that country is not so large, if you go there you ought to have some pay for the difference. The treaty says the Crows were to be fed four years; somebody told the Crows it was forty years; that was a mistake; it was not true. This is the last year, but I do not want it to stop. I want that they shall have plenty to eat. The Great Father at Washington wants them to have plenty to eat, but every four years they have a new Great Father at Washington; perhaps some other man may be Great Father some day, and he may not want you to have these things. I hope you will always have them until you learn to make them like the white men; but I cannot tell; a new Great Father may be a different kind of a man. Now you can fix it so that it does not make any difference who the Great Father is, but you can always have plenty. You can do it this way: if you like Judith Basin, and want it for a reservation, we can go and say to the Great Father, it is smaller than this reservation, and for that reason you ought to have something always every year, in place of the big piece of country which you sell. We can ask him to give the Crows Judith Basin, and, because you give up this reservation, to give you food and things you need, so that you will never want. We can ask him to give you this, the interest

of a million dollars, and every year you would get fifty thousand dollars in food and such things as you need; that is what we would ask the Great Father to do, and we think he would do it, but we do not know whether he would do it or not; he might think it too much, but if he thinks it is too much, and does not agree to it, it would be all the same as it is now. I have told you much that I think and what I tell you is what I think is the best thing that could be done for you. These gentlemen with me all think the same way. I do not think I am wrong, and I know that I will not be afraid to meet the Crows anywhere, here or in the spirit-land, for what I have done is for your good and all I tell you is true and comes from my heart.

BLACKFOOT. What you have said we have listened to and we think it is true. At Laramie the treaty was made. We did not feel right. We had made a long journey and were tired and sick. They gave us some horses. They thought they were doing a big thing, and making us a big present. But the horses were wild like the antelope. We caught them with the lasso. They jumped and kicked; we held on tight to them, but they got away from us; we were sick hunting them, and when we got home nearly all of them were gone. The commissioners told me that we should have plenty of food given us for forty years. They were big men who talked with us; they were not drunk when they told us. We were men andheard them, and so it ought to be written in the treaty. I told the commissioners at Laramie that I had been the Sioux commit a great massacre; they killed many white men. But the Sioux are still there and still kill white men. When you whip the Sioux come and tell us of it. You are afraid of the Sioux. Two years ago I went with the soldiers; they were very brave; they were going through the Sioux country to Powder

River and Tongue River. We got to Prior Creek, just below here in the Crow country. I wanted to go ahead into the Sioux country, but the soldiers got scared and turned back. I was there and so were others who are here; they know what I say is true. The soldiers said they were going to Tongue River, but they got frightened at the Sioux and turned back. The soldiers were the whirlwind; they went toward the Sioux country, but the whirlwind turned back. Last summer the soldiers went to Prior Creek again; again they said they were going through the Sioux country, but they saw a few Sioux; they were afraid of them; they got scared and turned up to the Muscle-Shell, and went back again; again the whirlwind was going through the Sioux country, but again the whirlwind turned back. We are not the whirlwind, but we go to the Sioux; we go into their country; we meet them and fight, but we do not turn back; but we are not the whirlwind. You say the railroad is coming up the Yellowstone; that is like the whirlwind and cannot be turned back. I do not think it will come. The Sioux are on the way and you are afraid of them; they will turn the whirlwind back. If you whip the Sioux, and get them out of its way, the railroad may come, and I will say nothing.

We were born on this side of the Yellowstone and were raised here. It is good land. There is plenty of good land here. Timber and grass and water are plenty, and there is much game in the mountains. You talk about Judith Basin, and say you are going to give us plenty to eat. We do not want to exchange our land. You are my friend. If we were to go to the white man's country and bloody it as they do our country, you would not like it. For many years I have known the whites. You have a big heart, but it is not so with the white men who come into my country. Some of them never sucked their mother's

breasts. I think they were raised like the buffalo, and sucked a buffalo cow for their mother. They have no hearts. I was not raised in that way; I am a man. I was raised and sucked milk from my mother's breasts. There is no white man's blood on our hands, and I am no ashamed to shake hands with you. What I say is true. I am your friend. The sun sees me and hears what I say. The Great Spirit hears me and knows it is true. Did I ask these white men to come here and crowd me? Buffalo robes are my money; we have some buffalo left yet. If I go to the buffalo country and bring no robes back, the traders will not look at me; they won't be glad to see me and shake hands with me, and say "How," "How," as they would if I had plenty. I think you had better leave Pease with us as he was before. If you put anybody else here, very soon they will kick me in the face with their foot. All the men who have Crow women, we don't want them sent away. They are my friends and I want them to live as I do.

MR. BRUNOT. About Pease I have nothing to say. I told you I liked him; and I like other good men who do right to the Indians. The Great Father does as he pleases about these things, so I have nothing more to say about it. But as to what I said about Judith Basin. I know every man cannot think alike. Blackfoot in some things does not think just as I do. He says what he thinks; I say what I think; both are men. What difference if we do not think alike in everything? We can be friends. I am not afraid to say what I know is right; so Blackfoot says what he thinks is right, and I like it. The Great Father sent me to talk to the Sioux; they asked for guns to fight the Crows. I said they could not have them. I was not afraid of Sioux soldiers; so now I would not be afraid of my friends, the Crows. If I am not afraid to speak to enemies, I am not afraid to speak my mind

to my friens. I want you to know, and you do know, that what I say is true, and that it is for your good, so you will think and talk about it, and perhaps, after awhile, you will think I was right. Suppose you think I made a mistake; you are still my friends; you are the white man's friend all the same. But you must talk about these things and see if they are not good. What have I been waiting for? Because I like you and want to do something for you. I have staid a long time; we have had two days' talk; we talked of things that were in the past and of things that are now. But this matter of the land is the most important thing; if we get it fixed we can settle the little things afterward. The agency buildings were burned up; they ought to be built somewhere else very soon, and they ought to be built and in a good place where the stake will be down strong; where there is plenty of wood and water and good farming-land, and where the Indians can stay in the winter without having their heads blown off by the wind. You want it where you can stay. Suppose the question of the land is settled; then we can locate the agency. If you decide to go to Judith Basin, we will put the agency on some of the streams there in a good place. Suppose you do not want to go there; then the agency must be put on some creek here. I am afraid if the stake is put down here it will not be a strong stake in the ground, but if it were put at Judith Basin, I think it would be, but it is for you to know what is best. You need not talk till you think about it. I think I can stay till to-morrow night, and I will hear all you want to say by that time. I think you can decide about these things, so we can take your words to the Great Father; so we can put it in a paper; but I do not know; we will see.

Wolf's Bow. We have been talking to each other a long time. You have said what you have to say. If

you want my land that is over here, (above,) I tell you we will sell it to you. We asked you for fifteen hundred guns of all kinds for the mines; we want them right away in ten days. If you want to build a new agency, go to the foot of the canon on this side of the land we give you. We will go for buffalo, and when we come back we will find the new buildings there. We told the peace commissioners at Laramie we would hold on the white man's hands always. It was put on paper there; we have a copy, and I will show it to you. We said to one another then, we would never point our guns at each other as long as we were Crows. The Sioux fight the whites; they wanted to give us mules and horses to help them fight the whites, but we would not. We have fought the Sioux, and have left many good men on the battle-fields. When I go for buffalo, the Sioux fight me for my land. I will continue to fight them. If the soldiers go to fight my enemy, the Sioux, they do not go far; they turn back close to here. We went to fight them this summer; they were as well armed as we were. We want you to tell the Great Father the Sioux have more guns than they ought to have, and he ought not to give them any more.

MR. BRUNOT. The Great Father does not give them any guns. I am afraid the Sioux get their arms from the same kind of people who give whisky to the River Crows. I got up to say that we have been here a long time. I have talked a great deal, and so have you, and we had better think about it a little. We have some tobacco we want to give you, and we want you all to come to-morrow morning.

After distributing some tobacco the council adjourned.

Third day.

AUGUST 13, 1873.

Council convened at 1 o'clock.

Blackfoot made a long speech to his people, closing up with the request that the commissioner should explain the treaty to them. He said there was nothing in the treaty of what they had said to the commissioners at Fort Laramie, and nothing of what the commissioners had said to them. He said our country is not as large as the commissioners promised it should be, and we do not understand the treaty as you read it. We do not think you will tell us a lie. None of the chiefs would accept this treaty. Show-his-face was the only one who was willing to take a copy of it. We want you to tell us what is in it. None of the Indians who were at Laramie know what is in the treaty.

The council opened with prayer by Dr. Wright.

Mr. Brunot. You would like to know everything that is in the treaty. I will tell you. I do not know whether what is in it is good and pleases the Crows or not, nor does it make any difference whether it pleases me now, or whether I like it or not. All I know, and all the Crows need to know, is that this is the treaty as it was signed at Laramie. Yesterday I told you some of the things I read in it. To-day I will tell you again, because Blackfoot asks me to do so. It reads. "This is a treaty made at Fort Laramie, on the 7th of May, 1868, between the peace commission and the chiefs and head-men of the Crow Tribe of Indians." Article first says, "There shall always be peace between the Crows and the Government. If bad men, the whites or any other people, do wrong to the Crows, they must tell the agent, and the Great Father will have them punished. If bad men among

the Crows kill or harm the white men or take their property, they are to bring them to the agent and have them punished."

BLACKFOOT. Who made this treaty?

MR. BRUNOT. I will read their names: Generals Harney, Sherman, Augur, and others. This copy that Show-his face has was made by Captain Burt at Fort Smith, and it is a copy of the one the peace commission made. The one I have is just the same.

The second article says the United States agrees that this country shall be set apart for the occupation of the Crows and other friendly Indians, whom they wish to have and whom the United States consents shall occupy it. The country begins where the one hundred and seventh degree of longitude crosses the southern boundary of Montana; then up in a straight line to the Yellowstone; then following it till it crosses the southern boundary of Montana; and thence in a straight line east to the place of beginning. This country is for the Crows and the people who are sent to live with the Crows. Then it says after that time the Crows give up all right to any part of the United States except this part embraced in the reservation.

The third article says, because the Crows gave up the other country the United States agrees to build, on Otter Creek, a warehouse, a house for an agent, doctor, carpenter, miller, blacksmith, and engineer, and when the children of the Crows are sent to school, a man shall be sent to teach them; and a school house shall be built; and when it is time to do so, the United States is to build a saw-mill, grist-mill, and shingle-mill.

Article fourth says, the Crows agree, when a house for the agent and other buildings are built, that they will make the reservation their home always, and

they shall not settle anywhere else; but as long as there is peace between the Crows and the whites they may hunt buffalo where there are any and where there are not too many whites.

Article fifth says, the agent shall live among the Crows, and listen to their complaints, and do as the treaty says. If the Crows or the whites do anything wrong, the agent is to send word to the Great Father about it; and what the Great Father decides is right, that the agent shall do.

Article sixth says, if any of the Crows, or any one whom the Government and the Crows allow to live with them, wish to farm, the agent shall help them; and if any Indian selects a piece of land for a farm it shall be entered in a book, and it shall always be his, and he can get a paper from the agent to say that is his. The Great Father may, at any time, survey the land, and mark it out in patches, to show what each one owns. The United States may make laws to show what kind of title the Indian people shall have.

BLACKFOOT. It is all lies; we do not want to hear any more. Wrap it up and throw it all away. We will not have that treaty.

MR. BRUNOT. You had better hear it all and know what you are to get. (At this point there was much excitement among the Indians, many of them declaring they would hear no more. After waiting a few minutes Mr. Brunot insisted upon silence, and said:) You asked me to read the treaty. I am going to tell you all that is in it. It goes on to say that all treaties made before this one are gone, but from the time of this treaty, the United States agree to send to the Crows the following articles: For each male Indian over fourteen years of age, a suit of good woolen clothes; for each woman over twelve years of age a flannel skirt, or goods to make it, some calico,

or twelve yards of cotton domestic; and for the boys and girls younger than fourteen and twelve years, flannel and cotton goods to make each one a suit; and it says, so that the Great Father can send these things, the agent shall each year send word how many Indians there are to get them. This is to be done for thirty years. That is your annuity goods. In addition to this, the Great Father is to send money to the agent to use for the benefit of the Indians at the agency — not to give the money to them, but to spend it for their benefit and make them comfortable and happy. If the Indians do not want the clothing, they are to tell the agent what they do want; and if the Great Father thinks it is good for them he will send them what they want, instead of the clothing, but the agent must send to the Great Father word what they want, and the Great Father must give permission to do so, before any change can be made. For fear some one might not give all their goods to the Indians, some officer must come and see that they get them. The United States agree to send an agent, physician, engineer, blacksmith, carpenter, and farmer, and to pay them while they are here. It says the Crows must have food for four years.

I did not make this treaty. I see that, although the Crows may have made a mistake about the land, the treaty is good for them. The Great Father lives a long way off; he is trying to keep his part of the treaty; but I told you he could not see into the gulches and all these places, and he cannot come from Washington with all the goods that are sent. One man cannot always tell what is being done a great way off, but he wants to do the best he can for you, and wants you to do the best you can for him. You know the goods last year and year before were better than you got before. The reason is, men are trying to get what is right for you. I want you to un-

derstand it and know that there are bad white men, just as there are bad Indians. A bad white man steals your horse; it is not the Great Father, nor is he to blame for it. If a bad Crow takes a horse I do not blame it on Blackfoot; but if a white man takes a Crow horse the agent finds it out and tries to have the man punished. Sometimes he runs away. So it is with the Indians. The chiefs do not want bad Indians to do wrong; neither does the Great Father want bad whites to do wrong to you. Now, we all understand about the treaty, and we will put it away and say nothing more about it.

After you have been thinking about it, you may decide that Judith Basin is a good place to keep always. If you do you can then come here and hunt, just as you do there now. The difference is, now you own this, and hunt and stay over there; but if you sell this, you would own over there, and could come and hunt here. I have talked a long time, but it is your fault, not mine. You asked me to tell you what was in the treaty. When I told you some of it you wanted me to stop. That is not right. If you want to know what is in a man, you want to know all about him; so it is with this paper, and when you have heard it all it is not so bad for the Crows.

BLACKFOOT. We wanted to know just what was in that treaty, and my friend has told us. I have said before that we are friends, and that we like each other; yet we have different thoughts in our hearts. The first time I went to Fort Laramie and met the peace commissioners, what each said to the other, we said "Yes, yes." The second time we went, we signed the treaty; but neither of us, my white friends nor the Indian chiefs, said "Yes, yes," to what is in that treaty. What we said to them, and what they said to us, was "Good." We said "Yes, yes," to it; but it is

not in the treaty. Shane was there the first time, and what he interpreted to us are not the words that are in the treaty. The first time we went, we did not sign the treaty; we only said "Yes, yes," to each other. The Indian way of making a treaty is to light a pipe, and the Indians and their white friends smoke it. When we were in council at Laramie, we asked whether we might eat the buffalo for a long time. They said yes. That is not in the treaty. We told them we wanted a big country. They said we should have it; and that is not in the treaty. They promised us plenty of goods, and food for forty years—plenty for all the Crows to eat; but that is not in the treaty. Listen to what I say. We asked, "Shall we and our children get food for forty years?" They said "Yes;" but it is not that way in the treaty. They told us when we got a good man for agent he should stay with us; but it is not so in the treaty. We asked that the white man's road along Powder River be abandoned, and that the grass be permitted to grow in it. They said "Yes, yes;" but it is not in the treaty. The land that we used to own we do not think of taking pay for. We used to own the land in the Mud River Valley. These old Crows you see here were born there. We owned Horse Creek, the Stinking Water, and Heart's Mountains. Many of these Indians were born there. So we owned the country about Powder River and Tongue River, and many of our young men were born there. So we owned the mouth of Muscleshell, and Crazy Mountain, and Judith Basin; many of our children were born there. So we told the commissioners. They said "Yes, yes;" but there is nothing about it in the treaty. We told them there were many bad Indians, but that we would hold on to the hands of the white man, and would love each other. We told them the Piegans, the Sioux, and other tribes have killed white men. We told them the

whites should not be afraid of them. I asked them to look at us; that we had no arms, and they should not be afraid of the Crows. They said "Yes, yes;" but it is not so written in the treaty. The treaty, you say, has bought all our land, except on this side of the river. And what do we get for it? I am ashamed about it. We sell our land, and what do we get for it? We get a pair of stockings and when we put them on they go to pieces. They get some old shirts, and have them washed, and give them to us; we put them on, and our elbows go right through them. They send us tin kettles; we go to get water to carry to our lodges; we dip the water up, but it all runs out again. That is what we get for our land. Why do they no send us annuity goods; We go to the buffalo country and get skins; our wives dress them, and we give them to our friends. We give more presents to our white friends than all the annuity goods we get are worth. And this is what we get for our lands. What goods are given us are no better than we give the whites, and I do not see what we are getting for our lands. We told the commission at Laramie that the Sioux were in our country on Tongue River. The Sioux and the Crows are at war; yet I went into the Sioux camp alone. They offered to give us two hundred and sixty horses and mules, all taken from white men, if we would join them; but we refused to do so. They took me by the arm, and asked me to stay with them and fight the whites; but I pulled loose from them and would not do so. I told the commission that I was asked to hold the whites with my left hand and the Sioux with my right hand; but now I gave my right hand to the whites, and would hold on to them; they said "Yes, yes." But none of this is in the treaty. We told them we had plenty of fish and game; and when they got scarce we would tell them, and ask help from them.

They said, "Will you sell the Powder River country, Judith Basin, and Wind River country?" I told them no; but that is not in the treaty. When Major Camp came here as agent, we gave him a present of a large number of robes to send to the Great Father. We never heard that the Great Father got those robes; we would like to hear about them. The Crow tribe want Major Pease to remain with us as our agent. Some of the young men want him to take them to see the Great Father at Washington. You ask us to tell you what we want. We want Mexican blankets, elk-teeth, beads, eagle-feathers, and panther and other skins. We like fine horses and needle-guns; these things are to us what money is to you.

MR. BRUNOT. I told you last night I could not stay much longer. I would like to stay a month, and than I might want to stay longer. I would like to stay and talk to you, and hear you talk. Our hearts are close together. You know what I have said is true. Sometimes we know a thing is good, yet we want to keep it away from us; it troubles us. A man has a horse which he likes; somebody offers him something for it that is better; at first he does not want to part with the horse; he thinks of it, and finds he gets something better for it; then he will let it go. Just so about this land. The place on which we were born and raised we think is all the good place there is. Those that were born on Wind River thought that no other place was as good; those who were born down on the Yellowstone thought no place was as good as that. The same men have been here a while; now they think this is better. You have this reservation; you think it a good place to live on; and you go to Judith Basin to hunt. You are right; this is a good place, and you do not like to think about making a change. It belongs to you, and you can do as you please about it. If you listen and do as I want,

I think it is good. If you do not think it is good, I will still say you can do as you please about it. It is like a man who does not want to let his horse go till he thinks about it; when he thinks about it and finds it is better to do so, he lets it go. The man thinks about it till he gets his mind made up. It ought to be the same way about this business. You should think about it and talk about it. Do not put it away out of your mind until you are sure you are going to do right. Do not put it off till you find the commission is gone and all our words are lost. When we come together again you can come and tell us what you think about this business. If you put it off till some other time it may be too late. The treaty says the white men, the Crows, and other Indians can go to Judith Basin. If the Crows wanted to live in Gallatin Valley they could not do it. The white men are there; so, if the white men are in Judith Basin, the Great Father cannot let the Crows live there; it will be too late after the white men are there. The whites are not there now; and before it is too late I would like the Crows to think about it and decide. But do not forget you can do just as you like best. You are men, and can make up your own minds; and what I tell you is because I am your friend, and want you to have good houses and plenty to live on. If a man was to tell me to come and get some of the Crow land for myself, I would want to strike him to the ground. I do not want anything you have, nor do I come to get things for other men. I come because the Great Spirit tells me it is right to do good to the red men. What I say is from the heart, and the time will come when you talk about the matter, and I will take your words to the Great Father. After that I will tell you something in regard to what Blackfoot said about going to Washington. I want to tell you about that after the other things are settled.

BEAR-WOLF. What we say and agree to, we say "Yes, yes," to, on both sides. Blackfoot went to Fort Laramie. They talked with each other; they said "Yes, yes." But when he came back we did not agree to what had been done. We want to go to Washington and see the Great Father. The Chiefs are here, and we want to hold on to our lands. You bring a treaty; it is full of lies. The words that have gone to the Great Father have always been lies. Indians that fight the whites, the whites always do what they want. If you take us to Washingtn we will shake hands with our friends. The Great Father will talk good to us. I want no bad luck on the way. The old men are here; you see them; so are the younger men. It is us who own the land, and we will have our say about it. We want you to give us the means to go to Washington.

The council here adjourned.

Fourth day.

AUGUST 14, 1873.

Owing to the protracted rain no general council was held to-day. The chiefs, however, were gathered in council, containing all the afternoon.

Fifth day.

AUGUST 15, 1873.

Council convened at twelve o'clock. Blackfoot made a long speech to his people being frequently interrupted by the other Indians.

Council opened with prayer by General Whittlesey; after which three hours were given the Indians in which to discuss among themselves the propositions in the articles of agreement.

Council re-assembled at three o'clock.

MR. BRUNOT. When we ceased talking in the council it was raining, and we said we had talked a good while and now it was time to think some and make up our minds. That was what I told you, and the chiefs said it was good to think about it. I told you to make up your minds, and whatever you said, so it should be. If you decided not to sell this place, then we know the Crows do not want to sell it; but I told you what I thought was good for you to do. I asked you to think and see if you could not do that. The next day it rained so much that we did not come together again. I think the rains came so that you would have a longer time to think and decide what you would do. The rain comes on the ground; then the sun comes and makes the ground warm, and makes the grain grow for food for your ponies and the buffalo. So to-day the sun is bright and beautiful; and I hope that the Crows' hearts are good, and that they will decide to do what is good for themselves. Whatever you do I hope it is for a long time and for your good. We talked three days, and now this is the last day to talk, and whatever is done must all be done this evening, so that we may go in the morning. What I said was put in a paper; and if you have decided to go to Judith Basin, we will put our names to the paper, and you will put your names to it, and we will take it to the Great Father at Washington. But if you have decided the other way, we will tear up the paper, shake hands, and be friends all the same. Now we want to know what you have made up your minds to do.

BLACKFOOT. We have been meeting white men before. Whenever we met them we had something to say to them. We met you, and you told us what was written down you would take to the Great Father. We have talked three days, and my tongue is not tired.

Mr. Brunot then explained the provisions of the articles of agreement in a general way, and said: If you wish, the paper will be read; then you can put your names to it or not, as you wish.

BLACKFOOT. On this side of the river and on the other side is our country. If you do not know anything about it, I will tell you about it, for I was raised here. You mark all our country, the streams and mountains, and I would like to tell you about it; and what I say I want you to take to your heart. You make us think a great deal to-day. I am a man, and am talking to you. All the Indian tribes have not strong arms and brave hearts like we have; they are not so brave. We love you and shake hands with you, (taking Mr. Brunot's hand.) We have gone to Judith Basin a great deal, and you wish us to take it for a reservation. All kinds of men go there; trappers and hunters go there poisoning game. The Sioux Indians, Crees, Santees, Mandans, Assineboines, Gros Ventres, Piegans, Pen d'Oreilles, Flatheads, the Mountain Crows, the River Crows, Bannacks, Snakes, and Nez Perce' Indians and white people, all go there. You wish us to take the Judith Basin for a reservation. All these Indians will come, and we will likely quarrel; that is what we think about it. Judith Basin is a small basin; a great many people go there; we all go there to eat buffalo. I have told you about the Sioux when they come to fight us. We go a long way from our camp. All Indians are not as strong as we are; they give up and run off. If you have two dogs, if they go to fight, and you catch them and pull apart, when you let them go they fight again. So it is with the Sioux and Crows. You tell me the railroad is coming up the Yellowstone. If you move this place away from here, the Sioux will be like a whirlwind; they will come and fight the whites; that is true as I tell you. Along Prior Mountain is the Crow trail. We

listen to you, and what I tell you is true. The young men do not care what they do. We want some of them to go to Washington with Major Pease, and what they say there will be all right. I will tell you what we will do; neither of us will live forever; in time both of us will die. We will sell the part of our reservation containing the mountains from Clark's Fork, below the mountains, and the valleys we will not sell. The Crow young men will go to Washington and fix it up, and come back and tell us about it. We will sell the range of mountains to Heart's Mountain and Clark's Fork. They young men will sell it at Washington, and they will say to the Great Father at Washington, that the Crows have a strong heart and are willing to sell their land. When you buy this and give us plenty for it, we will talk about the rest, if you want to buy it. Those mountains are full of mines. The whites think we don't know about the mines, but we do. We will sell you a big country, all the mountains. Now tell us what you are going to give for our mountains. We want plenty for them. Am I talking right? The young men think I am talking right. Every one here is trying to get plenty. The railroad is coming. It is not here yet. You talk about Judith Basin. I have heard about it. I want to see what you will give for the mountains; then we will talk about the rest of our land. You think you have peace with the Sioux; I do not think you have. You want to shake hands with them. We want to know whether you are going to fight the Sioux or not; we want to know. We will see what the young men will do at Washington; if they hear what is good, we will do it. The railroad will not be here for some time, and before that we will be part of the time on this side and part of the time on the other side of the river. In the Gallatin Valley, if you sell a house and a little piece of

ground, you get paid for it. I know that is the white man's way of doing. The white men are all around us. On the other side of the river all those streams belong to the Crows. When the Sioux come there, we can run them off into the river. We are friends; when our friends get horses stolen, we give them some. Many of our horses are stolen here; four of my horses are gone now; last night some horses were stolen. The Sioux took them along the mountains. On the other side of the gap, there are plenty of houses full of everything. In Gallatin Valley are plenty of cartridges; the Crows have none. If the Sioux come, I do not know what we shall fight them with. See all these old women! They have no clothing; the young men have no good blankets. We would like the Nez Perce's, when they raise camp, to come here; they die with the Crows; they help to fight the Sioux. The last commission told us we could eat buffalo a long time. While we are here, the Flathead Indians take our horses. I would like you to take our part and stop them.

MR. BRUNOT. We talked about the horses this morning with Major Pease; he is going to send and get them; and the troops will take the horses if they find where they are, and they will bring them back.

BLACKFOOT. We did not know you had talked about it. We would like you to say "yes" to what we said. At Laramie we said, yes! but not to what is in the treaty.

MR. BRUNOT. Tell Blackfoot every man is not like every other man. I was listening, and I heard all he said, and it went into my heart. If a man hears something that makes him sorry, he looks sorry; if he thinks he is going to hear what is good, and he does not hear it, he looks sorry. I heard all he said; and when he got through, it was time for me to say

something. Somebody took some horses. I heard it, and talked with Major Pease, and he is going to send for them; he is going to send to Fort Shaw, and if they find the horses, they will ask the soldiers to get them back. You have an agent to look after such things, and he does the best he can. So, Major Pease is going to try and get them back. They have one of our horses, too; I guess you did not know that. (This seemed to amuse them very much.) Now we will talk about the treaty; it is far more important that a few horses. The paper that we have made about Judith's Basin, I think we had better read; then you will know what I think is good for you. Then I will tell you what I think of your proposition. The miners were at Emigrant Gulch long ago; some are on Clark's Fork. The Great Father knows that; he could send the soldiers and made them go away, but suppose he should do that, what would happen? Some of these men would get mad at the Crows about it, and would do something wrong; and perhaps they would get others to help them, and perhaps the Crows would go after them, and somebody might get killed; perhaps a white man, perhaps an Indian. If somebody got hurt, his friends would want revenge; soon we would be quarreling. I do not want it to be so, nor does the Great Father want it. The Great Father says he does not want the Indians' land taken, nor does he want trouble; so he sends us to see whether you will take money for what the white men are doing; and find a place for the Crows where there is no gold for people to run after. If Blackfoot has a good American horse, and I have a horse that is not so good, I come and say we will trade, and he will say I do not want to trade; he thinks about it and says, "my horse is better and you must give me something more;" if I say, "I will give you something more," then we make the trade.

So with this country; I say to you, you have a big country, and some of these people are on it; you like the country; I show you another country; you go to it; you like it; I say if you like that country, go there, and let the white people have this country, and we will give you so much. You get all the annuity goods and all that is in the other treaty, but you get them at Judith Basin instead of here. You live in this country now and hunt over there; if you listen to me, you will live over there and come here and hunt as much as you please." Then, every year as long as you and your children live, you have money from the Great Father to buy what you want. Every year the Great Father asks the agent what do the Crows want this year? The agent asks the Crows and the Great Father sends the things; that is the way it is in the paper. That is how it will be, if we all say, "yes," and put our names to the paper. The reason why I do not think Blackfoot's proposition is good, is this: if the Crows keep the valley and sell the mountain, the whites will want all the time to go through your country; your horses will not be safe. If you want wood it is nearly all in the mountain. You sell even the water-courses with them; it would not be good to sell that and keep this; do you not see that? The white men in the mountains would be glad if I agreed to what you propose. If I cared only for them, I might agree to it, but I care for the Indians and cannot agree to it. I do not think that would be good for any of us, for trouble might come. If you cut off all above Clark's Fork, I would carry the proposition to the Great Father, and he would give money for it, but I do not think that would be so good as to sell this place and take the other; you would not get as much for it. Blackfoot asked me about the Sioux; some of them live on the Platte and on the Missouri; they are holding the

white man's hand, and they do not come up to fight the Crows, but there are some who are not holding the white man's hand. But the Great Father has sent his troops, and two boats have come to the mouth of Powder River and the soldiers are building a warhouse there. They are there now; you will soon hear of their being there. In regard to going to Washington, I have something to tell you about it, but it is best not to talk of that until we have settled about the land. I think some of you ought to go to see the Great Father, and I want some of you to go, and I want you to come and see me at the same time. You will see the other gentlemen who are here, and you will have a nice time and be much pleased. You can tell the Great Father what we say "yes" to, with your own mouths. I want Major Pease to go with you. All I am afraid of is when you come back, all the Crows will want to go. Now I want you to take a vote and see whether you will agree to what we offer. The sun is going down, and what we do must be done soon. If you agree to what we offer, I will go away glad, for I think it is good. I have seen you a week, and I like you, and I want nothing but good for you, and I will always think of you, and will think for your good, I will do all I can for you, and whatever is right for the Great Father to send you, I will ask him to send; these gentlemen think the same. The Crows want some horses; we will ask the Great Father to send you some, but we will not put it in the paper, for the paper is for all time. The horses would be soon gone; but what is in the paper for you to get lasts always; you get them every year. I will read what is in the paper.

The articles of convention were then read as follows:

Articles of convention made and concluded on the

16th day of August, in the year of our Lord one thousand eight hundred and seventy-three, at the Crow agency, in the Territory of Montana, by and between Felix R. Brunot, E. Whittlesey, James Wright, commissioners in be-half of the United States, and the chiefs, head-men, and men representing the tribe of Crow Indians, and constituting a majority of the adult male Indians belonging to said tribe.

Whereas a treaty was made and concluded at Fort Laramie, Dakota Territory, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between commissioners on the part of the United States, and the chiefs and head-men of and representing the Crow Indians, they being duly authorized to act in the premises;

And whereas by an act of Congress, approved March 3, 1873, it is provided: "That the Secretary of the Interior be, and he is hereby authorized to negotiate with the chiefs and head-men of the Crow tribe of Indians, in the Territory of Montana, for the surrender of their reservation in said Territory, or of such part thereof as may be consistent with the welfare of said Indians: *Provided*, That any such negotiations shall leave the remainder of said reservation in compact form, and in good locality for farming purposes, having within it a sufficiency of good land for farming and a sufficiency for water and timber, and if there is upon said reservation a locality where fishing could be valuable to the Indians, to include the same if practicable; and the Secretary shall report his action, in pursuance of this act of Congress, at the next session thereof, for its confirmation or rejection;"

And whereas, in pursuance of said act of Congress, commissioners were appointed by the Secretary of the Interior to conduct the negotiations therein contemplated, the said commissioners on the part of the United States, and the chiefs, head-men, and men consituting a majority of the adult males of the Crow tribe of Indians, in behalf of their tribe, do solemnly make and enter into the following agreement, subject to the confirmation or rejection of the Congress of the United States, at the next session thereof.

ARTICLE 1. The United States agree that the following district of country, to wit: commencing at a point on the Missouri River opposite to the mouth of Shankin Creek; thence up said Creek to its head, and thence along the summit of the divide between the waters of Arrow and Judith Rivers, and the waters entering the Missouri River, to a point opposite to the divide between the head-waters of the Judith River and the waters of the Muscle-Shell River; thence along said divide to the Snowy Mountains, and along the summit of the said Snowy Mountains in a northeasterly direction, to a point nearest to the divide between the waters which run easterly to the Muscle-Shell River and the waters running to the Judith River; thence northwardly along said divide to the divide between the head-waters of Armell's Creek and the head-waters of Dog River, and along said divide to the Missouri River; thence up the middle of said River to the place of beginning — the said boundaries being intended to include all the country drained by the Judith River, Arrow River, and Dog River — shall be and the same is set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States

now solemnly agree that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians; and the United States agree to erect the agency and other buildings, and execute all the stipulations of the treaty of Fort Laramie (the said stipulations being hereby re-affirmed) within the limits herein described, in lieu of upon the south side of the Yellowstone River.

ART. 2. The United States agree to set apart the sum of one million of dollars, and to hold the same in trust for the sole use and benefit of the Crow tribe of Indians, the principal to be held in perpetuity, and the interest thereof to be expended or re-invested, at the discretion of the President of the United States, annually, for the benefit of said tribe.

ART. 3. It is mutually agreed between the United States and the Crow Indians, that the second article of the treaty made at Fort Laramie between the commissioners of the United States and the Crow tribe of Indians be, and the same is, abrogated by this agreement, and the said Indians cede to the United States all their right, and title, and claim, to the tract of country described in the said second article, to wit: "Commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said

parallel of latitude to the place of beginning," and which is conveyed to them therein, except the right to hunt upon said lands so long as they may remain unoccupied, and as game may be found thereon, and peace continues between the whites and Indians.

ART. 4. The United States agree to suppress, so far as possible, by the imposition of pains and penalities, the practice of wolfing, of killing game by means of poison, within the limits of the following district of country, viz: beginning at the mouth of the Muscle-Shell River; thence up the said river to the North Fork, and up the North Fork to its source; thence northward along the summit of the Little Belt and Highwood Mountains to the head of Deep Creek; thence down said creek to the Missouri River, and along the margin of said river to the place of beginning.

It is expressly understood between the commissioners and the Indians, parties thereto, that this agreement is subject to the ratification or rejection of the Congress of the United States at its next session, and that, pending the action of Congress, the United States shall prevent all further encroachments upon the present reservation of the Crow tribe.

The articles were carefully explained until they were fully understood by the Indians.

THIN BELLY. I say let them have the land.

LONG HORSE. We will give you this land for what you say. This side of the river belongs to us; we will sell it. These are our chiefs. We have waited for Iron Bull and Blackfoot to say they will sell the land; they don't say so, but the young men now say to sell it. I am going to come here to hunt. Do not let wolfers come here. These young men are chiefs and want to go to Washington to see the Great Father;

let them go.

IRON BULL. Take the names of those who will sell; they will not touch the pen to sign the paper; they think it is bad luck; they will come up and say "yes," "yes."

BLACKFOOT. We smoke together; we talk through the pipe. As I told you, we are friends. The young men say they will sell and we agree to it. We want all on the other side of the river away up to Judith Basin. It is a small country.

MR. BRUNOT. The Great Father sent me; and I do what he says if I think it is good for those I am talking to. What I thought was good I put in the paper.

BLACKFOOT. You ought not to give the Sioux guns and ammunition; you should wipe them all out; you should throw a bad disease on them.

MR. BRUNOT. The Great Father did not tell me to talk about the Sioux. I have told you what is in this paper. Now we want all who agree to this to come and say "yes," so that after it is all over, nobody can say it is the fault of somebody else. I will put my mane to it and I will never be afraid to say that I think this is good for the Crows. If you don't want to agree to this paper you will say so, and there will be none of it. I want all of you to say "yes," and then we will know it is all right. We will call the names and if you don't want to say "yes," don't say it. If more say "yes" than say "no," it is good.

MANY INDIANS. It is too small a country in the Judith Basin. We want from the Yellowstone to the Missouri.

OLD CROW. If we take Judith Basin we can shoot from one line of our country to the other line.

IRON BULL. We want to move over there, but we want all the otherside of the river; that is what we

want, and we tell you so.

MR. BRUNOT. I don't say "yes." I want to talk to the young men. You say you want all the country the other side of the river; that is a bigger country than this. If I would give it, I would have to say, "What will you give for the difference?" Some people will talk that way. Most of the country over the river white people cannot live on, and never will live on. Why did I not put that in with the Judith Basin? That would make your land as big as this. If I went to the Great Father and said, "I gave the Crows all the other side of the river for this," he would say, "Why did you do that?" If I said "I promised to give the Crows, every year, food and clothing besides," he would say, "That will not do." It is no use to tell him that. But if I say, "I gave the Crows a smaller piece of land and they give you a bigger piece of land, you must give them goods every year," he will say, "That is all right." If I put in the bad land, that will make it as big as this reservation, and it would do you no good except to hunt on, and you can hunt there anyhow.

BLACKFOOT. The Crow country is a big country, and we will give it for the country on the other side of the river. What I tell you is good for both sides; and we want, besides, what you told us you would give us. This is our country, and what we give is worth more than all the other side of the river. You want to give us a little hole; we want a big country; you gave the Sioux a big country, and the Crows are a big tribe and want a big country. While Blackfoot was speaking a woman came forward to speak.

THE ONE WHO GOES RIGHT STRAIGHT ALONG. I am a woman and ought not to speak in council, but I want to speak of the first council on Horse Creek. My brother went to the States and

never came back. You want to give us a little territory, and we don't want it. The whites killed my brother, for he never came back, and you never paid me anything for him. Another time we were on the Little Horn; we lived in a big grass lodge, and a white man poisoned my other brother, and he died. You bought our land before, and gave us kettles that would not hold water. We want all the other side of the river from the mouth of the Yellowstone. I want my son to have a big country; you offered us a little country and I don't want it.

OLD CROW. Tongue River, Rosebud, Powder River, and Big Horn are full of wood. In Judith Basin is no wood for a camp.

MR. BRUNOT. I am afraid some one has been talking to you who is not a Crow, and you have his ideas. If I were a Nez Perce', I might say to you do not take Judith Basin; if I were a Blackfoot, I would say do not take it; if I were a Wolfer, I would say do not take Jidith Basin; and what is the reason? All these people can now go in there; if it belonged to the Crows, they could not. May be some of this kind of people have been talking to you; if any of these people advise you not to take it, you can see the reason. I told you the second day why I wanted you to have Judith Basin. Now, I tell you according to the treaty, the white men, the Wolfers, and other Indian tribes can go there the same as the Crows. These men are going in there, more and more of them every day. If you put off, for a year or two, getting it, so many whites will be there, that you can not get it. That was one reason I was desirous you should have it now. It is not a big country; I know that is a small country. The time was when all the country from the Missouri River to the mountains had no white people; now there are a great many. Blackfoot

spoke about the Sioux; there were a great many Sioux; they roamed on the plains, on the Platte, and the Republican, as they pleased. They went and fought the Utes, they went as far as they pleased. The Kiowas and Comanches were all over that country once. The whites said they were going to make a railroad, and all these Indians said as a few Sioux do now, they would not have it. If you go down there now you will see not one railroad only, but many railroads, and when your young men go to Washington, they will go ten times as fast as a horse can go. That railroad was made; the Sioux could not stop it; what could they do? They could go to the white man's cabin, where he slept, and kill him, but they do not go there to do it now, and the reason was they did not take the white man's hand then; the Great Father sent them away to the barren lands on the Arkansas, and the Sioux will be pushed I do not know where. The Great Father does not want to serve his friends so. The Great Spirit tells us we are of one blood, and must do what is good for the red men who hold our hands, as we would for our children, and that is the way I feel to the Crows. And that is why I come here. Now I have come and said what I think is right. I have given the Great Father's message. The Great Father wants to save trouble. He is willing to pay you for the mountains the white people have been going into. I told you there was a good place where you can stay forever, and it is a good place for you to go to. I have told you how the buffalo have left other countries and how they will go from this. When the buffalo is gone, if you stay here till then, you can only live on a piece of this country. You can only hunt on the other side as long as there are any buffalo. Your ponies can range on the Yellowstone, and they can range up to the Judith, but you cannot cover it all over with your

villages; because your lodges don't cover it all over is no reason why you cannot hunt on it. This place is your home; it does not keep you from hunting where you please. If you take Judith Basin for your home, it is the same thing, only that is your home. You know that is a better place than this to stay both summer and winter; you stay there now longer than anywhere else. If your agency was there it would be better and you could come to this country to hunt. You say you want all the other side of the river for your reservation; that is not what the Great Father tells me to say. I cannot give you that, because the Great Father will say the paper is not good. I thought you had made up your minds to say yes to what we offered, but you say you want something else. I have said All I have to say about the proposition. We offer land, and we offer money every year for food and for the goods you need. I am going away, and that is the end of it now. But I will always think about the Crows as friends, and I hope whatever you do will be good for you. I do not know that I will ever see you again. You will remember my words, and some day you will know what I said was good for you, and all I said was true. I want some of the chiefs to go and see the Great Father. Suppose I was to die as I go to the Great Father; nobody would think the Crows killed me. Because there was a Crow man went a long way and died on his way home, that is not because the white men did bad; it was because they gave him so many good things to eat; but these young men must not eat so much. Now we will shake hands and stop the council, and it is all over, but we are better friends than when we first saw each other. But if the chiefs want to come yet and agree to the paper, they can come.

BEAR-WOLF. We want you to hold on a while. I want to go with peace and see the Great Father and

talk with him. We want to go and see how it is. You claim all on the other side of the river and give us a small piece of land. We want to go and see about it; we want Bravo and Shirley and Major Pease to go with us. We offer to give you a big country and a rich country; we love our Great Father, that is why we offer to give it to him. You want to give us a little country where there are no mines.

The council here adjourned. After the council, Iron Bull, Long Horse, and Thin Belly are three of the principal chiefs, Blackfoot being the only principal chief not expressing a willingness to agree to it.

Sixth day.

AUGUST 16, 1873.

In the morning all the chiefs and young head-men came and expressed a desire to sign the agreement.

MR. BRUNOT, after ascertaining that they fully understood it, said: You wish to tell me that you agree to the exchange for Judith Basin, as it is in the paper.

ALL THE CHIEFS. Yes; we all agree to it.

MR. BRUNOT. I want you all to come, one at a time, and say "yes." Bring all the others, and they will say "yes;" that is enough.

IRON BULL. If all the chiefs say "yes," that is enough.

MR. BRUNOT. It is better the others should say so too.

They then came forward, one at a time, and said "yes." In signing, all expressed the wish that they might be permitted to eat buffalo as long as there was any; others asked that they should have horses; others asked for guns; and many asked that Agent Pease should be retained. To all of these the explanation was fully given that the paper did not

promise any of these things; but they were told that when they went to see the Great Father they could talk to him about giving them what they wanted.

All who were present, being all the chiefs and headmen, (except one,) came forward, and, fully understanding the articles of convention, assented to them, each saying "yes."

At twelve o'clock we left the agency for Bozeman.

Respectfully submitted,

THOMAS K. CREE,
Secretary.

To the Special Crow Commission.

* * * *

CROW TRIBE EXHIBIT NO. 75

The Children of the Long Tailed bird are called Crow Indians by the white man. They call themselves Absaroga or Absaloga—but the white man finds it easier to say Absaroka.

However it is said, the name belongs to a people proud of their heritage. *Always tribal elders have been keepers of the* tribal history.

One such man was Old Coyote, warrior, chief and historian, who was one of a group of wise far-sighted men who guided their people during the painful

transition from the life of the plains to the life of the reservation.

Old Coyote was probably *born about 1857,* before anybody started keeping records. As a youth he was called Wolf Comes Up, for his mother saw a wolf on the crest of a hill shortly after he was born.

His adult name was conferred on him by Chief Mountain after he was wounded in a battle with the Blackfeet not far from Hardin, in what is known as the Corinth area.

Old Coyote was a member of the Lumpwood Warrior Society and the Ties the Bundle Clan—the clan recognized for having the most chiefs in that day among the Crows. He took a leading part, too, in the rites of the sacred Tobacco Society, and carried the pipe on many a war party. He was a companion and co-worker with Plenty Coups, Medicine Crow and others who are better known.

Old Coyote, a scout for General Crook, was wounded in the Battle of the Rosebud. A handwritted statement made in 1908 certifies to this and also says his wound kept Old Coyote from doing manual labor from that time on.

This did not prevent Old Coyote from owning a few head of stock in the Pryor area, or from attending the councils of his people and giving them his advice and leadership. Nor did it prevent him from becoming foremost among the Crow historians in his generation.

The family moved to St. Xavier. Here others who kept the verbal history of the people used to come to

smoke with him and go over the old stories. Old Coyote also kept in his mind the war songs of fighters among his people.

He died on April 29, 1934. His family believes he was about 77 years old.

By that time he had passed much of his lore on to his oldest son, Barney Old Coyote, Sr., and to his oldest grandson, Henry Old Coyote, who spent countless hours at the feet of his grandfather.

Henry Old Coyote operates a ranch at St. Xavier and also is Crow Tribal coordinator.

He has taken the part of Sitting Bull in Custer's Last Stand ever since the show's first production in 1964.

He has an outstanding war record. He volunteered for service in the Air Force, and was decorated 10 times. He earned the Air Medal for meritorious achievement and nine oak leaf clusters in his three and half years in the service. He was overseas for 15 months.

Mr. Old Coyote is stepping into his grandfather's moccasins as a keeper of the Crow stories and traditions. He not only recalls the stories, he has taped many of them from the old men of the tribe, and is translating them from his native tongue into English.

Following is a part of the Crow Indian heritage, as Old Coyote told it to his grandson, Henry.

The mountains were called Big Horn for the sheep that lived there. And as the Absaroga (Crow Indians) moved from place to place long ago, they sometimes hunted the sheep for novelty or variety in their diet.

And now one time a woman of the tribe lost her husband in battle just before the birth of their son and so she married another man. This new stepfather pretended he loved the boy and took the boy hunting, let him ride the best horse, and carry the meat back to camp. If others were near, the stepfather would proudly say, "Later on, this little man will be the main provider!"

But these were not his real feelings. The truth was that the stepfather did not like the boy and sought a way to get rid of him.

The people moved about until they came to the area of Muddy Springs. Buffalo were plenty so the Head Chief called the men, "Come over and let's smoke together. There are no enemies near. This is a good place to camp. The womenfolk can work on the hides they are tanning."

It was decided. The Head Chief announced to the people, "We are not going to move for a day or so. Anyone wanting to get game, plan on it. You are free to do so."

And then the stepfather told his wife, "I will take the boy and hunt big horn sheep instead of buffalo. I have hunted big horn sheep before. I know just where they are located."

No one else was going after big horn and thus the stage was set for events that followed. It was as if some unseen force caused the stepfather to do this.

When last seen by the people of the camp, the stepfather and the boy were headed in the direction of Hol-in-the-Rock along the upper edge of the steep red wall of the mighty canyon. When they arrived in the area of Hole-in-the-Rock, the stepfather kept looking down into the canyon. Finally he got off his horse, walked to the edge.

"There are some big horn sheep down there.

Come, get down and look."

The boy got off his horse, walked to the edge and looked, but he could not see the sheep.

"Lean over a little farther and you will see them."

The boy leaned over. And then the stepfather pushed him over the edge. As the boy fell from sight, the stepfather took the boy's horse and left.

After dark, the stepfather returned to camp without the horse and told the mother he had sent the boy home earlier. The frightened mother went to the Head Chief and sought help to look for the boy.

The Chief announced the loss and requested all good men to help. For four days they searched and found nothing.

The bereaved mother went to the edge of the camp and cried. And then she prayed, appealing to all of the great powers that she wanted to see her son again.

Since neither boy nor horse was found, the Chiefs reasoned that he had been captured. But he was such an age, he knew he was Crow and he would return when he could. The sad mother cut her hair as the Crows did when they believed a loved one was dead and wore the clothes of mourning.

And then the camp moved. . . . .

When the stepfather pushed the boy, the boy didn't fall all the way to the river bottom. An outcrop of cedar along the steep wall grew in such a way that the boy fell into its branches. It was strong enough, so he straddled it and looked around. There was the steep red wall above him and if he dropped, he'd be crushed on the giant rocks below. There was nothing to do but to shed tears.

On the morning of the fourth day, when the camp of his people moved, he was there in the trees. As

day became a little light, he heard voices.

One was the voice of a girl. The boy in the tree could tell that she addressed a boy because of the name she used, One-That-Is-Able To-Run-Along-The-Side-of-a-Sharp-Incline. When the other voice answered it was that of a boy. He addresed the voice that was a girl and called her Big-Horn-Sheep-Woman. So the boy in the tree heard the girl saying, "There's a poor creature up there. Do you see it? There's a poor creature that is helpless, a pitiful creature in distress."

The boy sheep said, "Yes, I see him but what can we do?"

The girl said, "why don't we go back and tell the rest of them and see what they can do."

The boy heard the sound of hoves as they went along the canyon wall. He could tell by the sound of rocks tumbling down that the boy and girl sheep moved away from him. After a while he heard sounds at the bottom of the canyon. He sensed a lot of activity but the sounds were far away and hazy. Then he heard someone announcing. "There's a poor one up on the side of the canyon with no one to help him. I'm calling upon the strong ones who are sure of themselves, the most able among you."

"I am named White Horn. You all know me. I'm calling on you. I'm older than you, my horns are weatherbeaten and white and worn from age. I'm old and gray and have seen many years. I am wise. This is why I am calling you all together. Your strength and skill are needed at this time. You who are greatest, the time has arrived for you to show courage and ability to help. Come forward and help the helpless one."

After the boy in the tree heard the announcement, the boy and girl sheep came back up. The girl asked

the boy sheep, "Shall we tell him now?"

The boy sheep answered, "He will find out soon enough."

The girl said, "I'm going to tell him anyway." She addressed the boy in the tree, "Older brother, the most able ones of our kind are on their way to give you help.

The boy sheep was running along the canyon walls, pretending to have a good time, but letting the boy in the tree know he had company now, keeping his spirits up. The girl said. "Cease crying, older brother. They're going to help you now."

The sun was not yet up, but the day grew brighter. And then the boy in the tree heard hooves beating on the rocks, coming upward. The sheep arrived and gathered around and the boy looked down. There were some big ones there. One that looked like a leader was talking to the rest.

"All right, we'll try. Now we know all of you are sure of yourselves, but I'm going to call on four, including myself. Big Horn Ram, I select you. You try first. Next I'll call on Big Horn Sheep. Then on Never Slips. And I will follow up."

Quickly, Big Horn Ram was alongside the boy in the tree. "My child, I have come to help you. But you must do as I say. I want you to grab my horns and drop onto my back and close your eyes."

The boy knew if he let go of the cedar, he might fall. If he didn't do as told, he might die there. He had no choice. So he did as he was told. He grabbed Big Horn Ram's horns and fell from the cedar. Hanging on, he put his face down and pressed it against the neck of the ram and closed his eyes.

All of the sheep sensed his feelings. One-With-White-Face encouraged the frightened boy, "My child, don't be afraid. Do as you're told if you want

to get out of here alive."

Now the boy could feel the ram leaping ahead, jumping many times straight up the canyon walls. The boy was not a good rider in such a place. With the burden on his back, Big Horn Ram soon played out. Then he said to Big Horn Sheep, "Come to my assistance. Your help is needed now."

So Big Horn Sheep pulled alongside and said to the boy, "Now you must change to my back and do the same as you were instructed before."

Then Sure-Footed-One came along, and finally the last ram. After the boy got on and closed his eyes, he felt the mighty ram leaping upward. Finally the ram gave a great lunge. Then the boy could feel the ram walking quietly. The big ram said, "My child, you can open your eyes now. You're up on top."

When the boy opened his eyes, these four lay on the ground panting. Then the Old Wise One with white face and horns told the boy, "After your fathers get their wind back, they will tell you things."

Then the sheep came back. The boy noticed that the last ram who had carried him had horns and hooves of glistening metal. That ram said, "My name is Big Metal. Right now I give you that name."

Then he ordered White Face and Horns to announce to all the animals and birds to gather around. After they were gathered, Big Metal said, "I have already given you my name, my child. I am Chief of the Big Horns in these mountains. I give you my name and whatever powers it takes to be a Chief. You will accomplish many things. You will become a Chief of all Chiefs."

He spoke to the different animals and birds, "You in the animal kingdom have possessed all sorts of

powers but you didn't come to the aid of this boy in distress. You didn't show your powers. I, Big Metal, have brought your child to safety. After I have talked to him and the rest of my kind are through telling him what they have to tell, it's up to the rest of you to give him something—whatever you wish, if you want to."

There were seven sheep, Big Metal, Never Slips, Big Horn Sheep, White Horn, Ram Sits Down, Cupped Hooves, and Big Horn Ram.

Each in turn gave the boy something, some power that each himself possessed—wisdom, sharp eyes, sure footedness, keen ears, great strength, strong heart.

And then they said, "We seven rule these Big Horn Mountains. That river down there in the bottom is the Big Horn River. Whatever you do, don't change its name. It shall be known at the Big Horn River. If you ever change the name of the river there will be no more Absaroga. The Absaroga will be nothing.

Then Big Metal addressed the other animals and birds. "Now it's up to you if you have anything to give or to tell our child."

So different animals and birds came up and gave the boy the right to practice their powers by calling upon them. All the animals and birds took him as their child, Big Metal.

When they had finished, they said, "We have given you powers that are greater than any of the others to whom power have been given before. You now have the right to tease all people, to break their taboos, their strengths, for your powers are the greatest."

"We have given you everything for a good life, everything that makes a wise leader. What the Absaroga consider good will now come your way

without effort on your part."

And then they told him, "When you go home, your stepfather will be the surprised one. Don't be afraid to tell your people what happened, what we've told you. When you first go into your mother's lodge, throw this sinew into the fire. Your uncles and fathers here will take care of your stepfather for you. Don't do anything to him yourself. Just throw the sinew into the fire in your mother's lodge and leave the rest to us."

And they told him he would be a prophet for his people. Big Metal told him he would be Chief and nothing on earth could cause him death until he outlived four generations, that he would be a good provider, a good leader, a chief.

"Now, before you go, we have one more thing to tell you. This man here (addressing the badger), whenever he decides, he doesn't want to be moved, he sticks his claws into the ground and it's pretty hard to budge him. He has something to tell you."

So the badger told him, "The earth is my support, my shelter, my defense, my weapons, my everything. When you go home, build a sweat lodge. As you do so, dig a hole in the ground, put hot rocks in, pour water on. Mention my name, the badger, and your father's name Big Metal. Call upon us in seeking aid. Call upon me, the ground, the earth, the Badger. Whenever you are in a bad situation, someone is trying to crowd you out, mention your father's name and my name. I will stick my claws into the ground for you. When you talk to that earth, all of your fathers and I will hear you."

"Now, my child, go back to your people. Even this morning, they were still looking for you. They will camp tonight not far. Go now. If you start running, you will find your camp. Already you have great

power, sharp eyes, keen ears, strong legs. Tell you people anytime they get hungry they can come through this area. Even if you just think about us, you will happen onto game. If you merely think about these rams, game will be plentiful and you will come across it."

So they told him, "Go back!"

He caught up with the camp and went to his mother's lodge. He went inside. Just as he came inside he threw the sinew into the fire. The stepfather, as he saw the boy, grabbed his blanket and went out the door.

Upon seeing her boy, the mother cried out loud in surprise and joy. She had thought him dead. She had mourned. Her son was back.

He told his story to the people. At first after the boy told them his stepfather pushed him off the cliff, the warriors were ready to go. But upon hearing the rest of the story they decided to let the elements and forces out there take care of the stepfather.

And then the boy instructed the others how to build the sweat lodge according to the directions badger had given. He told them of the Big Horn sheep and that if the name of the mountains or the river were changed, the Absaroga would be no more.

After his return, the Absaroga moved camp many times. And then in the spring of the year, when snow patches were still left, the camp moved back to the same general area. On the ground they discovered some fragments of clothing by which they recognized the dead stepfather. They noticed that he was bent backward like a bow. As sinew in fire curls, so the stepfather's own loin had drawn up and he was twisted backward. Among the people, the stepfather had relatives who put him away. Then they left the place and forgot him.

From then on Big Metal had a normal boyhood. When he became a young man people saw that he had unusual powers—keen eyes, a fine sense of humor, a sharp mind. He was physically very active and strong, everything the Absaroga desire in a young man. He became a good warrior. He often warned his people if enemy war parties approached. When he went on a war party, he would predict what he would do—get horses, kill enemies, or whatever. And he could tell people where to go to get game. Often his powers were tested and they were strong. He broke many taboos.

The prediction that he would outlive four generations is believed to have come true. Before he died he told the people he wanted to be buried next to the Big Horn River. His fathers, the sheep, would come for him. When his people called upon badger and the animals in his name, those ones would come to their aid.

One day he wrapped his blanket around himself and lay down. . . .

THE BIG HORN LAKE

The Big Horn Mountains kept their name, but a part of the waters of the Big Horn have recently been in danger of losing their identity.

Last year, Yellowtail Dam, which impounded the waters of that river, was dedicated. During the construction period, and even as the waters rose along the walls of the Big Horn Canyon, the white man began calling the resulting lake Yellowtail Reservoir, and it was so designated in Washington.

Yellowtail is a name honored among the Crows, and they were content for the dam to bear it—but

not so the waters of the river. At their insistence, the name Big Horn Lake is now gaining acceptance.

The Crows may well find a part of their future along the mountains that edge the beautiful Big Horn Lake. They have been named master concessionairs for the Big Horn Canyon National Recreation Area, and will cooperate with the National Park Service in its development.

Already, the Crow people have built the Oke-A-Beh boat launching ramp, only a short distance upstream from the dam, and have the funds for a highway to it. That all-weather road will be constructed this summer. Nearby, on Pretty Eagle point, the tribe hopes one day to build a lodge and restaurant, along with other recreation facilities. The site is one of unmatched grandeur, for guests will be able to look down into the Big Horn Canyon with its vertical walls of rock, and into Black Canyon, which branches away to the east, its hillsides clad in deep green fir, pine and spruce trees.

The recreation area will offer opportunities for individuals to operate such things as bait and tackle shops, filling stations, souvenir and craft shops, and all the other businesses that cater to the travelling public.

So it is that the glistening metal which composed the horns and hooves of the sheep, Big Metal, may one day become gold in the hands of the Crows—a tribe which looks to the past for tradition, and to the future for progress for its people.

FISH AND GAME EXHIBIT NO. 5

Crow Indian Agency
Crow Agency, Montana
April 30, 1952

Otto Wesley Bear Ground
Tribal Game Warden
Pryor, Montana

Dear Sir:

The State trout fishing season will open on May 19th for this part of Montana according to recent releases by the State Fish and Game Commission. In order to avoid the confusion which arose last year, I want to again call your attention to the fact that your authority and responsibility is to protect the Tribal areas on the Reservation from fishing by non-Indians. You should confine your activities to that job.

You do not have authority to stop fishing by non-Indians on allotted lands. The owners of the land have that authority and if they desire to post their land against trespassing they have that privilege. It is not your responsibility to patrol allotted lands.

There will be no sale of permits by the Tribe to fish or hunt on the Reservation. The Secretary of Interior has never approved the request tht Tribe made over a year (six years) ago to authorize the Tribe that privilege and at a meeting a short time ago the Tribal Council revoked that request. This also means, of course, that there will be no permits issued to hunt or fish on Tribal land by non-Indians.

Last year I was given to understand certain Game Wardens had issued permits for hunting and fishing. You do not have that authority and this must not be repeated this year.

To repeat: 1. Your duties as Tribal Game Wardens are to protect the Tribal lands from hunting and fishing by non-Indians. 2. Your authority does not extend to the allotted land on the Reser-

vation. 3. No permits can be issued by any Tribal Game Warden or anyone else for hunting or fishing anywhere on the Reservation. 4. If an individual wishes to post his land to protect it from trespassing, he is lawfully within his rights to do so.

Sincerely,

L. C. Lippert
Superintendent

LCL:EBS
CC: Mr. Powers
Mr. Robert Yellowtail, Sr.
Mr. Perry Howe

FISH AND GAME EXHIBIT NO. 9

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

P.O. Box 1538
Billings, Montana

August 15, 1960

Memorandum

To: Area Director, Indian Affairs, Billings, Montana Attention: Law and Order

From: Field Solicitor

Subject: Act of July 12, 1960 (P.L. 86-634, 74 Stat. 869, 18 U.S.C. 1165)—Hunting, Trapping or Fishing on Indian Lands

In our discussions of August 2, certain questions were raised concerning the application of the subject Act. We were agreed that many of these questions would require Departmental or judicial deter-

minations. We were also agreed that certain of these questions would need tentative answers at this time, subject, of course, to more authoritative determinations at the Denver and Washington levels.

Your memorandum of August 3 set our certain of these questions upon which a preliminary opinion was believed to be immediately required. These questions are set our, below with the comments of this office following each question. The comments are based on the usual rules of statutory interpretation; on the material set out in House Report No. 625 (86th Congr., 1st Seas.) and in Senate Report No. 1686 (86th Congr., 2nd Sess.); and on the principles set out in *Williams* v. *Lee*, 358 U.S. 217.

QUESTION A1—Section 1165 provides that "Whoever, without lawful authority or permission...." Would the term "whoever" also include tribal members in so far as authority or permission being obtained to hunt or fish on the allotted lands of another tribal member?

COMMENT A1—Yes. Some question may later be raised as to whether an individual Indian may thus be deprived of any treaty right to hunt and fish on an Indian reservation. But for the present, I believe we must assume that the history and language of the statute indicates a purpose to cover both Indians and non-Indians.

QUESTION A2—Can a tribal council or executive board issue lawful authority to hunt or fish on an individual Indian allotment?

COMMENT A2—Yes, provided the Indian allottee does not take affirmative action to exclude hunters or fishermen with tribal permits. Affirmative action would be by posting his allotment or by personally opposing the entry of such hunters or fishermen. I

think their conclusion is warranted by the legislative purpose of providing tribal revenues. If a hunter or fisherman were required to have a license and tribal permit and also a written permit from the allottee, the licensing effort should discourage hunters and fishermen and tribal revenues from permits would not result.

I think the history of this legislation also indicates that the Congress was providing a hunting and fishing climate similar to that in non-Indian country, where a permit is required of the sovereign but where an individual landowner can only exclude a hunter or fisherman if he takes certain affirmative action.

QUESTION A3—Must lawful authority be in written form?

COMMENT A3—Both the cited House and Senate Documents indicate that the consent must be in the form of a license or permit for which a fee can be charged.

QUESTION A4—If verbal permission is considered lawful authority, must it be obtained from each heir, in instances where two or more heirs hold inheritance rights to allotted land? If written permission is required for this same inherited land, must it be signed by all heirs?

COMMENT A4—The permission of one heir, whether oral or in writing, would doubtless preclude successful prosecution of a hunter or fisherman who has such permission. See also Comment A2.

QUESTION A5—Can an individual Indian allottee issue permission and authority to a non-Indian to hunt or fish on his own allotment, even though the reservation may be closed by order of the Tribal Council or Executive Board?

COMMENT A5—No. It is believed that Congress

intended a situation similar to that on non-Indian land where the sovereign could prohibit all fishing and hunting.

QUESTION A6—Can an Indian land owner give lawful authority and permission to an Indian or a non-Indian to hunt upon his allotment which is under lease to another individual? Would the lessee or permittee have authority to post this leased land? Would the lessee or permittee have authority to protect his crop or livestock by refusing to allow seemingly careless and reckless sportsmen from entering his leased premises or would he be compelled to wait until damage has been done? If damage to crop or livestock occurred, who would be responsible, the sportsman or the lessor who gave him lawful authority to enter the premises.

COMMENT A6—This depends on the lease. Normally such permission could be given, but see Comment A2.

QUESTION A7—Who has authority to issue permission on Government lands reserved for use of Indians.

COMMENT A7—The Superintendent could prohibit hunting or fishing on Government lands reserved for Indian use; but if he did not, such hunting or fishing would appear permissable under a tribal permit.

QUESTION B1—Section 1165 provides that "Whoever without lawful authority or permission, *willfully* and *knowingly* goes upon any land that belongs to any *Indian* or *Indian tribe*. . . ." Must all land be posted? If so, must the posting be of legal ways and means, such as signs placed at regular intervals and of certain dimensions? What constitutes legal posting?

COMMENT B1—As indicated in Comment A2, I believe allotments must be posted if hunters or fishermen with tribal permits are to be excluded. But hunters or fishermen who do not have tribal permits should need no such warning. They should be assumed to know the legal boundaries of the Indian reservation. Nevertheless, good administration would dictate the posting of a prominent sign at each entry point of an Indian reservation. The sign should indicate that the Indian reservation here begins and that hunting and fishing without a tribal permit is forbidden. The character of the posting for allotted lands on which the allottee proposes to prohibit hunting and fishing might well follow the state statutory requirements for posting non-Indian lands.

QUESTION B2—To constitute a crime there must be unity of the act and the intent. An individual fishing or hunting on Indian land without permission would be committing an illegal act under 1165, but if such land were not posted, would the prosecution be able to prove intent? Would defendat's statement that he was not *knowingly* aware of the statue of the land be ground for not guilty plea.

COMMENT B2—The man who hunts or fishes on Indian land without a permit might, of course, plead that he did not know he was on Indian land. We will then have a question as to whether knowledge can be inputed to him by reason of certain signs which he should have seen, oral warnings which he should have respected, or the existence of legal boundaries. See also Comment B1.

QUESTION B3—Section 216 of U.S.C.A. having been repealed, by this act does Federal jurisdiction cease on fee or deeded lands within the exterior boundaries of an Indian reservation, that is with respect to hunting and fishing?

COMMENT B3--Prosecution under Section 1165 would not appear warranted for hunting or fishing on fee or deeded land.

QUESTION B4—Would tribal game wardens employed and salaried by the tribe have jurisdiction for enforcement of this Federal law, or would it be the responsibility of the special officers of the Bureau of Indian Affairs?

COMMENT B4—Bureau of Indian Affairs officers would have initial responsibility for enforcement of Section 1165. Tribal game wardens should be deputized, if possible. If they are not deputized, a citizen's arrest might be sustainable but could cause difficulty. In most cases, however, the tribal game warden's warning should be sufficient to assure compliance with the hunting and fishing prohibitions in Section 1165.

You have also asked whether a tribal ordinance implementing Section 1165 should be approved by the Secretary under 25 CFR 11, since non-Indians will be affected. Such approval is believed necessary.

(Signed) A.E. Bielefeld
A. E. Bielefeld
Field Solicitor, Billings

FISH AND GAME EXHIBIT NO. 23
UNITED STATES 15
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

P. O. Box 1538
Billings, Montana 59103

February 16, 1966

Memorandum

To: Area Director, Indian Affairs, Billings, Montana
Attention: Economic Development

Your memorandum of February 10, 1966 indicates that a resolution of the subject question is important to your planning of development areas on the Crow Indian Reservation, and would have significance on the Wind River Indian Reservation in Wyoming.

In *Crow Tribe of Indians* v. *United States*, Civil No. 214 (1963) D.C. Montana, Billings Division, it was held that the Big Horn River was a navigable water.

In *United States* v. *Holt State Bank* (1925) 270 U.S. 49, it was held that the State owned the bed of navigable waters wtihin the Red Lake Indian Reservation in Minnesota. This finding was made notwithstanding *Minnesota* v. *Hitchcock* (1901) 185 U.S. 373, where the integrity of the Red Lake Indian Reservation was affirmed and the State denied a claim to school sections within the Reservation. Emphasis in *Holt* was laid on the fact that Congress, in the Act of Admission (11 Stat. 166) declared that navigable waters "shall be common highways and forever free." In Section 12 of the Act of March 3, 1811 (2 Stat. 662, 666) Congress had used much the same language with respect to all navigable waters within the Louisiana Purchase.

The impact of *Holt* was considerably reduced in *Moore* v. *United States*, 9th Cir. 1946, 157 F.2d 760, where the court affirmed Indian ownership of the bed of a navigable water. The court emphasized that the Quillayute treaty provided for a reservation sufficient for the wants of the Indians who as early as 1888 had whaling, seal and salmon enterprises under way. The court distinguished *Holt* on the ground that no evidence was there adduced as to "the use

of the navigable waters with reference to established industries of the Indians."

Recently, however, the rule of *Holt* was revitalized when District Judge William J. Jameson, sitting on the 9th Circuit Court of Appeals relied on *Holt* to deny Indian rights to tidelands. *Skokomish Indian Tribes* v. *France*, 320 F.2d 205, 213; *cert. denied* (1905) 376 U.S. 543. Judge Jameson distinguished *Moore* on the grounds that the Skokomish Indians had not shown that the tidelands were essential to their livelihood.

It would be ingenuous, of course, to suggest that a single rule will determine whether the bed of a navigable water within an Indian reservation belongs to the State or to the Tribe. The language and purpose of the treaty setting up the Indian reservation, the wants and industries of the Indians and their established use of the navigable water will all have some bearing on the determination of ownership. In other words, the equities are important.

One thing indicated by the cited cases, and particularly *Skokomish*, is that the courts do not favor a dog-in-the-manger position. Where there are two claimants to a property, the one who can or does best use it may very possibly prevail.

In these circumstances, I believe a well-supported program to develop the resources of the Big Horn River would do much to bulwark the Crows' claim of title to the bed of the river. A do-nothing attitude would suggest that such resources are not important to the needs or advancement of the Tribe.

The fact has not been overlooked that a Tribal right to the bed of the stream would probably be challenged in any enforcement of Public Law 89-634 (18 U.S.C. 1165; 74 Stat. 469), which makes it a

crime to fish without permission on Indian tribal or allotted lands. Considerations to be weighed in the assertion of a tribal right to control fishing on navigable waters are set out in my memorandum to you, dated January 18, 1961, on the subject, "Public Law 86/634, Boundary Bill as it applies to the south half of Flathead Lake," copy of which is attached.

With respect to tribal control of fishing on the Wind River Reservation, I believe we may properly say that the question of title to the river bed is not present. The court's determination as to the navigability of the Big Horn River in *Crow Tribe of Indians* was addressed to proof and argument relating to the stretch of the Big Horn River below the Wind River Reservation. No claim was made as to the navigability of the Big Horn within the Wind River Reservation. If the river within the Wind River Reservation is not navigable, the bed of the stream would normally be owned by the abutting owners, who, in such case, would be primarily the Wind River Tribes.

A. E. Bielefeld
Field Solicitor, Billings

In duplicate

Enclosure (in duplicate)

FISH AND GAME EXHIBIT NO. 32
STATE OF MONTANA
DEPARTMENT OF FISH AND GAME
HELENA, MONTANA

OFFICE MEMORANDUM

To: Frank Dunkle Date: February 11, 1969

From: Fletcher Newby

Subject: Draft of Big Horn River Management Plan.

Enclosed are our suggestions for a management plan for the Big Horn River, including access acquisition and development and fisheries management.

FEN/af

cc: Art Whitney
Wes Woodgard

/s/ Fletch

BIG HORN RIVER MANAGEMENT PLAN

Introduction

Construction of Yellowtail Dam has increased the outdoor recreation potential of the general area significantly. National recognition has come through the creation of the Bighorn Canyon National Recreation Area. The National Recreation Area includes the reservoir, the take area and some adjacent lands, the afterbay and only approximately 900 feet of the Big Horn River below the afterbay. Water quality in the Big Horn River has improved substantially following the closure of Yellowtail Dam, primarily because of the removal of silt. In addition there has been an improvement in the temperature regimen, with summer temperatures cooler and winter temperatures warmer. The Montana Fish and Game Department stocked rainbow trout in the reservoir, the afterbay, and in the river immediately below the afterbay. Growth response in the clear, fertile waters of the river has been dramatic and has produced a splendid rainbow trout fishery.

The only legal public access to the Big Horn River is through the approximately 900 feet of river below

the afterbay, now included in the Bighorn Canyon National Recreation Area. This was the downstream boundary of the take area for construction of the afterbay. The Big Horn River has been decreed by the courts a navigable stream. As a result, the state has a valid claim to the bed of the river and to public access below the high water flow line. These claims are largely without practical effect however, without legal public access from the high water flow lines to the public highway system. An aggressive program for access acquisition and development is needed to provide for public enjoyment of this important resource.

Recreation Access Plan

Acquisition

The immediate goal should be recreation access points every 10 miles or approximately a day's float apart. The distance involved is about 37 miles, making three or four access sites necessary. The ultimate goal should be an access every 5 miles or approximately one-half day's float apart for a total of seven or eight evenly spaced access sites the most desirable arrangement.

Acquisition and development priorities would fall into three distinct areas. First priority goes to the reach of river between the afterbay dam and St. Xavier, a distance of approximately 15 miles. There are nine patented tracts containing approximately 5 miles of frontage within this area.

Second priority goes to the reach between St. Xavier and Two Leggins Dam, a distance of approximately 13 miles. There are six or seven patented tracts comtaining about 5 miles of frontage within this area.

Third priority centers on the portion of the river

from Two Leggins Dam to the mouth of the Little Big Horn River, a distance of approximately 9 river miles. There are seven or eight patented tracts containing about 6 miles of frontage in this area. It is recognized that the availability of land will greatly affect actual acquisition, but these priorities should be followed as closely as is practical and possible.

Development

Developments on the acquired recreation access areas will be associated with, and compared with, the National Recreation Area. For this reason it is recommended that developments follow the standards ds set for state recreation areas; not the usual fishing access standards. The Big Horn River is fully navigable and it would be entirely appropriate to use water-based monies in the development of these areas.

Big Horn River Fish Management Plan

The Big Horn River, below the afterbay dam, can be divided into two sections as far as the fishery is concerned. The portion of the afterbay dam to the south of the Little Big Horn River can be classed as a trout stream, with the upper 15 to 20 miles of a quality that could classify as "blue ribbon." The section below the mouth of the Little Big Horn River is more of a sauger-channel catfish fishery, with burbot, acme walleye and brown trout also caught.

The excellent rainbow trout fishery that has developed in the upper portion of the Big Horn River is due to stocking each year since 1966, of 10,000 rainbow trout fingerlings below the afterbay dam plus the addition of rainbows stocked in the afterbay reservoir and Yellowtail Reservoir proper. It is known that during the flood period of the spring of 1967 that a considerable number of fish passed

through these dams as evidenced by the considerable number of walleyes caught in the river below. Walleye had been planted only in the main reservoir.

A very limited amount of recruitment from natural reproduction is anticipated because of the small size and limited number of suitable spawning streams for trout. It is not anticipated that any substantial spawning will occur in the Big Horn River because of the cementing in place of the streambed gravel caused by the many years of heavy sediment load prior to the construction of Yellowtail Dam. This is based on inspection of the gravels below Boysan Dam on the Wind River or Big Horn after 11 years of operation. Wyoming fisheries personnel have seen no evidence of natural reproduction in the river below Boysen Dam.

Future management of the Big Horn River calls for continued annual stocking with 10,000 fingerling rainbow.

Marking experiments along with population sampling work will be carried on to determine the success of these plants, as well as the contribution from natural spawning. Methods used will be the electric shocker and creel census.

Age and growth work combined with bottom samples and stomach analysis will enable us to follow the condition of the game species involved.

Monitoring of the temperature regimen and flow patterns in the stream will be continued.

C' emical analysis, along with bottom samples and possible plankton samples, will enable us to monitor the fertility in the stream. To date, rainbow and brown trout up to eight pounds have been caught in the river along with numerous trout in the three pound class. All trout caught are in excellent con-

dition, indicating high fertility.

Adjustments can be made in the stocking program as future studies indicate and as access areas are acquired. This stream shows promise of developing into one of the top trout streams in the state.

FISH AND GAME EXHIBIT NO. 40

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

P. O. Box 1538
Billings, Montana 59103

September 8, 1972

Mr. Don Wright
State Fish and Game Department
Mitchell Building
Helena, Montana 59601

Dear Mr. Wright:

My letter of September 5, 1972 related briefly to the question of the state's jurisdiction over non-Indians who violate state law while on an Indian reservation. Since writing, I have noted the more authoritative and extended discussion of the problem in our Solicitor's opinion appearing in 78 I.D. 101, copy of which is attached.

Sincerely,

/s/ A. E. Bielefeld
Field Solicitor, Billings

Enclosure

cc:
Area Director, Indian Affairs, Billings—Attn: Glen Jackson & L&O Superintendent, Blackfeet Indian

Agency (w/cy enc. to each)

CRIMINAL JURISDICTION OF UTAH OVER NON-INDIANS HUNTING ON THE UINTAH AND OURAY RESERVATION IN VIOLATION OF STATE LAW

March 29, 1971

CRIMINAL JURISDICTION OF UTAH OVER NON-INDIANS HUNTING ON THE UINTAH AND OURAY RESERVATION IN VIOLATION OF STATE LAW

State Laws—Indian Lands: Generally—Indian Tribes: Generally

Utah game laws apply to non-Indians who hunt, even with the tribe's permission, on the Uintah and Ouray Indian Reservation. Thus, non-Indians cannot hunt on the reservation without procuring a state license, even though they may be licensed by the tribe to do so.

M—36813 March 28, 1971

TO: COMMISSIONER OF INDIAN AFFAIRS

SUBJECT: ELK—UTE TRIBE, UINTAH AND OURAY RESERVATION, UTAH

We have received your request for our advice concerning the Ute Tribe's right to allow nonresidents of Utah to hunt elk on the Uintah and Ouray Reservation. You indicate there were elk on the original Uncompahgre Reservation established prior to Utah's admission to statehood. In addition, the Ute Tribe recently obtained 100 elk from a herd at Yellowstone National Park, paying for their tran-

sportation and release on the reservation. We understand that the elk from Yellowstone were allowed to resume their wild state and were not kept in enclosures or attempted to be tamed or domesticated. They are, therefore, to be regarded the same as other wild elk for purposes of this opinion.

The tribe has apparently cooperated with state officials in establishing an elk season for Utah residents in return for Utah's assistance in the cropping of these elk. However, Utah has not been willing to work with the Utes in granting nonresidents of Utah the privilege of taking elk on the reservation. If these nonresidents cannot hunt elk on the reservation, the tribe will be deprived of a substantial source of income. You indicate your belief that the tribe owns the elk on the reservation and has the right to allow nonresidents of Utah to hunt them whether or not Utah grants the nonresident hunters permission.

Your statement of April 11, 1968, 82 Stat. 78, 25 U.S.C. Sec. 1321(b), to support the proposition that the Indians have authority to control, license, or regulate hunting, trapping and fishing on their reservation. This provision applies only to states which have assumed some measure of jurisdiction over Indian reservations under this act. Since Utah has not assumed any such jurisdiction, 25 U.S.C. sec. 1321(b) is not germane. Moreover, we do not believe this section *gives* tribes authority, exclusive or otherwise, to control non-Indian hunting and fishing on a reservation; it merely *preserves* whatever powers individual tribes may have in states which have been given or have assumed civil or criminal jurisdiction under the act.

While we do not agree with your statement that the elk on the reservation are the property of the Ute

Tribe, we concede there is some legal authority to support the proposition of tribal ownership of the fish and wildlife on a reservation. *Mason* v. *Sams*, 5 F.2d 255 (W.D. Wash. 1925); *Pioneer Packing Co.* v. *Winslow*, 294 P. 557 (Wash. 1930). However, these cases involved one tribe, the Quinaults, and were concerned with the interpretation of a treaty. Whatever the present validity of these two cases as applied to the Quinaults' or other Indians' rights to fish in the State of Washington, we do not consider them to be controlling, or even persuasive, legal authority in the situation considered here.

Even a state does not hold possessory title to the wildlife within its jurisdiction, but rather holds them in trust for the benefit of the people. *Geer* v. *Connecticut*, 161 U.S. 519 (1896); SOLICITOR'S OPINION, 71 I.D. 469, 476 (1964). If the tribe had captured and confined these elk, the argument in favor of tribal ownership would be stronger. However, there can be no individual property in fish and game so long as they remain wild, unconfined, and in a state of nature. 35 Am. Jur. 2d *Fish and Game* sec. 2 (1967). Title to the game in its natural habitat belongs to the first person who lawfully reduces it to possession. *Geer v. Connecticut, supra;* 4 Am. Jur. 2d *Animals* sec. 5 (1962).

We note in passing that Utah has a statute indicating that all game not held in private ownership legally acquired belongs to the state. 3 Utah Code Ann. sec. 23-1-10 (1969). However, it has been held that statutes like these are concerned only with the state's power of regulation, leaving the landowner's interest what it is. *McKee* v. *Gratz*, 260 U.S. 127, 135 (1922); Solicitor's Opinion, *supra.*

Since the states do not "own" the wild game within their borders, we do not see how an Indian

tribe can hold title to the game within its reservation unless one argues that tribal soverignty is a kind of sovereignty superior to that of states or the national government, and we consider this implausible. Therefore, we believe that an Indian tribe does not have title to the fish swimming or wildlife running free within its reservation, but does have the right to capture such game, after which time possessory title rests in the tribe.

Utah requires all persons to obtain a hunting license before taking any game. 3 Utah Code Ann. sec. 23-1-12 (1969). This provision also applies to Indians who are wards of the Federal Government when outside an Indian reservation. 3 Utah Code Ann. sec. 23-1-8 (1969). Utah also has a statute prohibiting any person from shipping game out of the state without having a valid license or permit attached to it. 3 Utah Code Ann. sec. 23-10-4 (1969). The question thus becomes whether Utah can enforce these statutes against non-Indians hunting elk on the Uintah and Ouray Reservation.

Without question, the tribe has authority to require non-Indians to secure reservation hunting and fishing permits and observe tribal conservation rules while on the reservation. SOLICITOR'S OPINION, 58 I.D. 331, 333, 346 (1943). It is also well settled that state game laws do not apply to Indians on trust lands within the Indian reservation. SOLICITOR'S OPINION, 54 I.D. 517, 520 (1934); *In re Blackbird*, 109 F. 139 (W.D. Wis. 1901); *In re Lincoln*, 129 F. 247 (N.D. Cal. 1904); *United States* v.

Hamilton, 233 F. 685 (W.D. N.Y. 1915).[1]

However, it must be remembered that Indian country is not regarded as an area of exclusive Federal jurisdiction, but is politically and governmentally a part of the state in which state laws apply to the extent that they do not conflict with Federal Indian law. *Federal Indian Law* (1958) 510, 513-514; *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 650-651 (1930). It is also well settled that offenses committed by a non-Indian against a non-Indian in the Indian country are punishable by the state. *United States* v. *McBratney*, 104 U.S. 621 (1881); *Draper* v. *United States*, 164 U.S. 240 (1896); *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946).

It seems apparent that a tribe's immunity from state hunting and fishing regulations is peculiarly Indian in nature and that a tribe cannot license the immunity to a non-Indian. SOLICITOR'S OPINION, 62 I.D. 186, 194 (1955); Hobbs, *Indian Hunting and Fishing Rights II*, 37 Geo. Wash. L. Rev. 1251 11267 (1969). The right is one exercised by members in common with other members of the tribe. 62 I.D. 186, 194 (1955); see *Montana Power Co.* v. *Rochester*, 127 F.2d 189, 192 (9th Cir. 1942).

There is authority which indicates that a non-Indian hunting on the reservation has no immunity from state regulations. *State of Montana ex rel. Nepstad* v. *danielson*, 427 P.2d 689 (Mont. 1967); *Ex parte Crosby*, 140 Pac. 989 (Nev. 1915); see *United States* v. *Sturgeon et al.*, 27 Fed. cas. 1357 (no.

[1]There is a split of authority of the applicability of state conservation regulations to an Indian on non-Indian land within the reservation. *State* v. *McClure*, 268 P.2d 629 (Mont. 1934) (no): *State* v. *Johnson*, 249 N.W. 284 (Wis. 1933) (yes). However, today, an attempt to enforce state conservation regulations against Indians in this situation would most likely be considered an interference with reservation self-government. *Williams* v. *Lee*, 358 U.S. 217 (1959).

16,413) (D. Nev. 1879).[2] In addition, various Attorneys General have taken the position that a state has jurisdiction over non-Indians who violate state game laws while on an Indian reservation. 1950-1952 Opinions of the Attorney General of Nevada p. 20; 1953-1954 Report of the Attorney General of New Mexico p. 511; 1960-1962 Opinions of the Attorney General of Oregon p. 11.

In the *Danielson* case, *supra*, a non-Indian killed two elk on the Crow Reservation in violation of Montana law. The Supreme Court of Montana stated at page 692:

* * *we conclude that the State of Montana has jurisdiction to enforce its fish and game regulations on Indian reservations contained within its boundaries with respect to persons who are not tribal Indians unless precluded from doing so by an act of Congress or unless such enforcement would interfere with self-government on the reservation.

In conclusion, we believe there is ample authority indicating that non-Indians are subject to state game laws while on an Indian reservation. Of course, Utah may not choose to prosecute nonresident non-Indians who may hunt on the Ute Reservation in

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[2]It is interesting to look at the legislative history of the act of July *12, 1960, 74 Stat. 469, 13 U.S.C.*§§1164, 1165 (1964), which made it unlawful to destroy boundary markers and to trespass on Indian reservations to hunt or fish. In a letter from the Assistant Secretary of the Interior to the Chairman of the House Committee on the Judiciary dated February 13, 1958, recommending passage of this bill, the Assistant Secretary said: "*While non-Indians are subject to State laws when they go on Indian Reservations, many of the States do not have criminal trespass laws, and in other states the Indians find it impossible to comply with the requirements of State laws designed to control trespass.*" (*Italics* added). H. R. Rep. No. 1686, 86th Cong. 2d Sess. 4 (1960). See also 68 IAM 4.6.2 E(1)(c), which indicates that non-Indians who have received tribal consent to hunt or fish are also subject to state and federal law.

violation of the state law. If Utah decides to exercise jurisdiction over these non-Indians, however, we believe the state has both the power and the right to do so.

MITCHELL MELICH,
Solicitor.

FISH AND GAME EXHIBIT NO. 53

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington 25, D.C.

Through: Area Director, Billings, Mont.

Chairman

Crow Tribal Council

Dear Mr. Chairman:

On August 24, the Crow Tribal Council enacted Resolution No. 149 concerning the regulation of hunting and fishing on the Crow Reservation. The resolution states that hunting and fishing within the boundaries of the reservation have been reserved by treaty for the exclusive benefit of the Crow Indians. It provides that hunting for game birds or game animals or fishing on any land within the Crow Reservation by other than members of the Crow Tribe and their spouses shall be unlawful except with a tribal permit. It also provides that a penalty of not less than $25 nor more than $300, or a sentence of imprisonment for a term of three months shall be imposed for violation of the resolution. The resolution would affect non-Indians and non-member Indians.

We have been unable to substantiate the provision

that hunting and fishing on the Crow reservation have been reserved exclusively to tribal members by a treaty with the United States. The treaty of May 7, 1868 (15 Stat. 649; 2 Kapp. 775), by which the reservation was created, provides, in Article 4, that the Indians shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts. The treaty makes no reservation of exclusive rights to the Indians to hunt and fish within the reservation. We have found no other treaty, agreement with the Indians ratified by law, or Federal statute subsequent to the 1868 treaty that affords such exclusive rights.

There is a considerable area of fee-patented land within the reservation owned by non-Indians. We are not aware of any judicial decision that an Indian tribe has the power and authority to prohibit non-Indians owning land within a reservation from hunting or fishing on such land, particularly in the absence of a clearly established exclusive right in the Indians.

Aside from the foregoing, however, the resolution appears to be fatally defective. It purports to subject non-Indians to criminal sanctions imposed by tribal authority. An Indian tribe has no criminal jurisdiction over non-Indians. See Cohen, Handbook of Federal Indian Law, p. 148. The Assistant Secretary of the Interior, in a letter dated June 4, 1954, to the Director of the Minneapolis Area Office of this Bureau, stated as follows: "Section 1 (a) of Article VI of the tribal constitution empowers the Lac du Flambeau Tribal Council to enact ordinances for the protection of fish and game but neither that nor any other provision of the constitution confers jurisdic-

tion on the tribe to enforce criminal sanctions against non-members of the tribe. The ordinance, therefore, is ineffective because its intent is beyond the constitutional power of the tribe." In addition, the court in which the criminal sanctions would be enforced is the Court of Indian Offenses maintained under Departmental regulations, 25 CFR, and that court has jurisdiction only over offenses committed by Indians. (See 25 CFR 1612, and our memorandum of August 30, 1954, a copy of which is enclosed with our letter regarding Ordinance No. 3.) Because Resolution No. 149 is beyond the power of the tribe and is therefore ineffective, we can not approve it. No purpose would be served by its disapproval by the Secretary of the Interior since it is already a nullity.

Sincerely yours,

Commissioner

cc: Branch of Land Operations
Branch of Tribal Programs
Billings Area Office
Crow Agency

FISH AND GAME EXHIBIT NO. 67

A TREATY OF PERPETUAL FRIENDSHIP, CESSION AND LIMITS,

Entered into by John H. Eaton and John Coffee, for and in behalf of the Government of the United States, and the Mingoes, Chiefs, Captains and Warriors of the Choctaw Nation, begun and held at Dancing Rabbit Creek, on the fifteenth of September, in the year eighteen hundred and thirty.

WHEREAS the General Assembly of the State of Mississippi has extended the laws of said State to persons and property within the chartered limits of the same, and the President of the United States has said that he cannot protect the Choctaw people from the operation of these laws; Now therefore that the Choctaw may live under their own laws in peace with the United States and the State of Mississippi they have determined to sell their lands east of the Mississippi and have accordingly agreed to the following articles of treaty:*

ARTICLE I. Perpetual peace and friendship is pledged and agreed upon by and between the United States and the Mingoes, Chiefs, and Warriors of the Choctaw Nation of Red People; and that this may be considered the Treaty existing between the parties all other Treaties heretofore existing and inconsistent with the provisions of this are hereby declared null and void.

ARTICLE II. The United States under a grant specially to be made by the President of the U.S. shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source (sec. source) of the Canadian fork; if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the Treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present

*This paragraph was not ratified.

Treaty shall be ratified.

ARTICLE III. In consideration of the provisions contained in the several articles of this Treaty, the Choctaw nation of Indians consent and hereby cede to the United States, the entire country they own and possess, east of the Mississippi River; and they agree to remove beyond the Mississippi River, early as practicable, and will so arrange their removal, that as many as possible of their people not exceeding one half of the whole number, shall depart during the falls of 1831 and 1832; the residue to follow during the succeeding fall of 1833; a better opportunity in this manner will be afforded the Government, to extend to them the facilities and comforts which it is desirable should be extended in conveying them to their new homes.

ARTICLE IV. The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisduction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs. But the Choctaws, should this Treaty be ratified, express a wish that Congress may grant to the Choctaws the right of

punishing by their own laws, any white man who shall come into their nation, and infringe any of their national regulations.

ARTICLE V. The United States are obliged to protect the Choctaws from domestic strife and from foreign enemies on the same principles that the citizens of the United States are protected, so that whatever would be a legal demand upon the U.S. for defence or for wrongs committed by an enemy, on a citizen of the U.S. shall be equally binding in favour of the Choctaws, and in all cases where the Choctaws shall be called upon by a legally authorized officer of the U.S. to fight an enemy, such Choctaw shall receive the pay and other emoluments, which citizens of the U.S. receive in such cases, provided, no war shall be undertaken or prosecuted by said Choctaw Nation but by declaration made in full Council, and to be approved by the U.S. unless it be in self defence against an open rebellion or against an enemy marching into their country, in which cases they shall defend, until the U.S. are advised thereof.

ARTICLE VI. Should a Choctaw or any party of Choctaws commit acts of violence upon the person or property of a citizen of the U.S. or join any war party against any neighbouring tribe of Indians, without the authority in the preceding article; and except to oppose an actual or threatened invasion or rebellion, such person so offending shall be delivered up to an officer of the U.S. if in the power of the Choctaw Nation, that such offender may be punished as may be provided in such cases, by the laws of the U.S.; but if such offender is not within the control of the Choctaw Nation, then said Choctaw Nation shall not be held responsible for the injury done by said offender.

ARTICLE VII. All acts of violence committed

upon persons and property of the people of the Choctaw Nation either by citizens of the U.S. or neighbouring Tribes of Red People, shall be reffered to some authorized Agent by him to be reffered to the President of the U.S. who shall examine into such cases and see that every possible degree of justice is done to said Indian party of the Choctaw Nation.

ARTICLE VIII. Offenders against the laws of the U.S. or any individual State shall be apprehended and delivered to any duly authorized person where such offender may be found in the Choctaw country, having fled from any part of U.S but in all such cases application must be made to the Agent or Chiefs and the expense of his apprehension and delivery provided for and paid by the U. States.

ARTICLE IX. Any citizen of the U.S. who may be ordered from the Nation by the Agent and constituted authorities of the Nation and refusing to obey or return into the Nation without the consent of the aforesaid persons, shall be subject to such pains and penalties as may be provided by the laws of the U.S. in such cases. Citizens of the U.S. travelling peaceably under the authority of the laws of the U.S. shall be under the care and protection of the nation.

ARTICLE X. No person shall expose goods or other article for sale as a trader, without a written permit from the constituted authorities of the Nation, or authority of the laws of the Congress of the U.S. under penalty of forfeiting the Articles, and the constituted authorities of the Nation shall grant no license except to such persons as reside in the Nation and are answerable to the laws of the Nation. The U.S. shall be particularly obliged to assist to prevent ardent spirits from being introduced into the Nation.

ARTICLE XI. Navigable streams shall be free to

the Choctaws who shall pay no higher toll or duty than citizens of the U.S. It is agreed further that the U.S. shall establish one or more Post Offices in said Nation, and may establish such military post roads, and posts, as they may consider necessary.

ARTICLE XII. All intruders shall be removed from the Choctaw Nation and kept without it. Private property to be always respected and on no occasion taken for public purposes without just compensation being made therefor to the rightfull owner. If an Indian unlawfully take or steal any property from a white man a citizen of the U.S. the offender shall be punished. And if a white man unlawfully take or steal any thing from an Indian, the property shall be restored and the offender punished. It is further agreed that when a Choctaw shall be given up to be tried for any offence against the laws of the U.S. if unable to employ counsel to defend him, the U.S. will do it, that his trial may be fair and impartial.

ARTICLE XIII. It is consented that a qualified Agent shall be appointed for the Choctaws every four years, unless sooner removed by the President; and he shall be removed on petition of the constituted authorities of the Nation, the President being satisfied there is sufficient cause shown. The Agent shall fix his residence convenient to the great body of the people; and in the selection of an Agent immediately after the ratification of this Treaty, the wishes of the Choctaw Nation on the subject shall be entitled to great respect.

ARTICLE XIV. Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall

thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this Treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the priviledge of a Choctaw citizen but if they ever remove are not to be entitled to any portion of the Choctaw annuity.

ARTICLE XV. To each of the Chiefs in the Choctaw Nation (to wit)Greenwood Laflore; Nutackachie, to Mushulatubbe, who as he had an annunity of one hunfour sections of land, two of which shall include and adjoin their present improvement, and the other two located where they please but on unoccupied unimproved lands, such sections shall be bounded by sectional lines, and with the consent of the President they may sell the same. Also to the three principal Chiefs and to their successors in office there shall be paid two hundred and fifty dollars annually while they shall continue in their respective offices, except to Mushulatubbe, who as he an annuity of one hundred and fifty dollars for life under a former treaty, shall receive only the additional sum of one hundred dollars, while he shall continue in office as Chief; and if in addition to this the Nation shall think propper to elect an additional principal Chief of the whole to superintend and govern upon republican principles he shall receive annually for his services five hundred dollars, which allowance to the Chiefs

and their successors in office, shall continue for twenty years. At any time when in military service, and while in service by authority of the U.S. the district Chiefs under and by selection of the President shall be entitled to the pay of Majors; the other Chief under the same circumstances shall have the pay of a Lieutenant Colonel. The Speakers of the three districts, shall receive twenty-five dollars a year for four years each; and the three secretaries one to each of the Chiefs, fifty dollars each for four years. Each Captain of the Nation, the number not to exceed ninety-nine, thirty-three from each district, shall be furnished upon removing to the West, with each a good suit of clothes and a broad sword as an outfit, and for four years commencing with the first of their removal, shall each receive fifty dollars a year, for the trouble of keeping their people at order in settling; and whenever they shall be in military service by authority of the U.S. shall receive the pay of a captain.

ARTICLE XVI. In waggons; and with steam boats as may be found necessary—the U.S. agree to remove the Indians to their new homes at their expense and under the care of discreet and carefull persons, who will be kind and brotherly to them. They agree to furnish them with ample corn and beef, or pork for themselves and families for twelve months after reaching their new homes.

It is agreed further that the U.S. will take all their cattle, at the valuation of some discreet person to be appointed by the President, and the same shall be paid for in money after their arrival at their new homes; or other cattle such as may be desired shall be furnished them, notice being given through their Agent of their wishes upon this subject before their removal that time to supply the demand may be afforded.

ARTICLE XVII. The several annuities and sums secured under former Treaties to the Choctaw nation and people shall continue as though this Treaty had never been made.

And it is further agreed that the U.S. in addition will pay the sum of twenty thousand dollars for twenty years, commencing after their removal to the west, of which, in the first year after their removal, ten thousand dollars shall be divided and arranged to such as may not receive reservations under this Treaty.

ARTICLE XVIII. The U.S. shall cause the lands hereby ceded to be surveyed; and surveyors may enter the Choctaw Country for that purpose, conducting themselves properly and disturbing or interrupting none of the Choctaw people. But no person is to be permitted to settle within the nation, or the lands to be sold before the Choctaws shall remove. And for the payment of the several amounts secured in this Treaty, the lands hereby ceded are to remain a fund pledged to that purpose, until the debt shall be provided for and arranged. And further it is agreed, that in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws.

ARTICLE XIX. The following reservations of land are hereby admitted. To Colonel David Fulsom four sections of which two shall include his present improvement, and two may be located elsewhere, on unoccupied, unimproved land.

To I. Garland, Colonel Robert Cole, Tuppanahomer, John Pytchylon, Charles Juzan, Johokebetubbe, Eaychahobia, Ofehoma, two sections, each to include their improvements, and to be bounded by sectional lines, and the same may be disposed of and sold with the consent of the

President. And that others not provided for, may be provided for, there shall be reserved as follows:

First. One section to each head of a family not exeeding Forty in number, who during the present year, may have had in actual cultivation, with a dwelling house thereon fifty acres or more. Secondly, three quarter sections after the manner aforesaid to each head of family not exceeding four hundred and sixty, as shall have cultivated thirty acres and less than fifty, to be bounded by quarter section lines of survey, and to be contiguous and adjoining.

Third; One half section as aforesaid to those who shall have cultivated from twenty to thirty acres the number not to exceed four hundred.

Fourth; a quarter section as aforesaid to such as shall have cultivated from twelve to twenty acres, the number not to exceed three hundred and fifty, and one half that quantity to such as shall have cultivated from two to twelve acres, the number also not to exceed three hundred and fifty persons. Each of said class of cases shall be subject to the limitations contained in the first class, and shall be so located as to include that part of the improvement which contains the dwelling house. If a greater number shall be found to be entitled to reservations under the several classes of this article, than is stipulated for under the limitation prescribed, then and in that case the Chiefs separately or together shall determine the persons who shall be excluded in the respective districts.

Fifth; Any Captain the number not exceeding ninety persons, who under the provisions of this article shall receive less than a section, he shall be entitled, to an additional quantity of half a section adjoining to his other reservation. The several reservations secured under this article, may be sold with

the consent to the President of the U.S. but should any prefer it, or omit to take a reservation for the quantity he may be entitled to, the U.S. will on his removing pay fifty cents an acre, after reaching their new homes, provided that before the first of January next they shall adduce to the Agent, or some other authorized person to be appointed, proof of his claim and the quantity of it. Sixth; likewise children of the Coctaw Nation residing in the Nation, who have neither father nor mother a list of which, with satisfactory proof of Parentage and orphanage being filed with Agent in six months to be forwarded to the War Department, shall be entitled to a quarter section of Land, to be located under the direction of the President, and with his consent the same may be sold and the proceeds applied to some beneficial purpose for the benefit of said orphans.

ARTICLE XX. The U.S. agree and stipulate as follows, that for the benefit and advantage of the Choctaw people, and to improve their condition, their shall be educated under the direction of the President and at the expense of the U.S. forty Choctaw youths for twenty years. This number shall be kept at school, and as they finish their education others, to supply their places shall be received for the period stated. The U.S. agree also to erect a Council House for the Nation at some convenient central point, after their people shall be settled; and a House for each Chief, also a Church for each of the three Districts, to be used also as school houses, until the Nation may conclude to build others; and for these purposes ten thousand dollars shall be appropriated; also fifty thousand dollars (viz.) twenty-five hundred dollars annually shall be given for the support of three teachers of schools for twenty years. Likewise there shall be furnished to the Nation, three Blacksmiths one for each district for sixteen years,

and a qualified Mill Wright for five years; Also there shall be furnished the following articles, twenty-one hundred blankets, to each warrior who emigrates a rifle, moulds, wipers and ammunition. One thousand axes, ploughs, hoes, wheels and cards each; and four hundred looms. There shall also be furnished, one ton of iron and two hundred weight of steel annually to each District for sixteen years.

ARTICLE XXI. A few Choctaw Warriors yet survive who marched and fought in the army with General Wayne, the whole number stated not to exceed twenty.

These it is agreed shall hereafter, while they live, receive twenty-five dollars a year; a list of them to be early as practicable, and within six months, made out, and presented to the Agent, to be forwarded to the War Department.

ARTICLE XXII. The Chiefs of the Choctaws who have suggested that their people are in a state of rapid advancement in education and refinement, and have expressed a solicitude that they might have the privilege of a Delegate on the floor of the House of Representatives extended to them. The Commissioners do not feel that they can under a treaty stipulation accede to the request, but at their desire, present it in the Treaty, that Congress may consider of, and decide the application.

Done, and signed, and executed by the Commissioners of the United States, and the Chiefs, Captains and Head Men of the Choctaw Nation at Dancing Rabbit Creek, this 27th day of September, eighteen hundred and thirty.

JNO H. EATON,
JNO. COFFEE

Greenwood Leflore,
Musholatubbee,
Nittucachee,
Eyarbocuttubbee,
Iyacherhopia,
Offahoomah,
Archalater,
Onnahubbee,
Holarterhoomah,
Hopiaunchahubbee,
Zishomingo,
Captainhake,
James Shield,
Pistiyubbee,
Yobalarunehahubbee,
Holubbee,
Robert Cole
Mokelareharhopia,
Lewis Perry,
Artonamarstubbee,
Hopeatubbee,
Hoshahoomah,
Chuallahoomah,
Joseph Kincaide,
Artooklubberushpar,
Metubbee,
Arsarkatubbee,
Issaterhoomah,
Chohtabmotabab,
Tunnuppashubbee
Okecharyer,
Hoshhopia,
Warsharshahopia,
Maarshunchabubbee,
Misharyubee,
Daniel McCurtain,
Tushkerharcho,
Hoktoontabbee,
Nuknacrahookmarbee,
Mingo hoomah,
Pisinbocuttabbee,
Tullarhacher,
Little leader,
Maanhutter,
Cowehoomah,
Tillamoer,
Innullachs,
Artopilachubbee,
Shupherunchahubbee,
Nitterhoomah,
Oaklaryubbee,
Pukumna,
Arpalar,
Holber,
Hoparmingo,
Isparkoomak,
Tieberhoomah,
Tishoholarter,
Mahayarchubbee,
Arlarter,
Nittahubbee,
Tishonouan,

FISH & GAME EXHIBIT No. 103

Bureau of Indian Affairs (Realty Branch)
November 1, 1960

Office of Regional Solicitor, Portland cc: BIA Files

Rights of purchasers of Indian land in connection with hunting and fishing.

Reference is made to your memorandum of October 26, with enclosures. You ask that we answer the questions contained in your memorandum and those also set forth in the letter of October 23, from the title company. We shall answer all the questions asked, but for reasons of expediency and clarity we are not doing so in the order asked.

In the treaty at Fort Bridger of July 3, 1868, with the Bannocks and Shoshoni Indians (15 stat. 673), no mention was made of fishing within the reservation. Article 4 provides that the Indians reserved the right to hunt on the unoccupied lands of the United States so long as game may be found there on. There is no question but that the Indians of the Fort Hall Reservation, having the exclusive occupancy of their reservation, have the rights to hunt and fish within the reservation, even though such rights was not expressly reserved in the treaty. Your inquiry concerns the right of non-Indian purchaser of Indian land within the reservation boundaries. Lands to which the United States has parted title, and over which it exercises no control, even if within the exterior boundaries of the former Indian reservation, are not a part of the reservation. (State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067 (1926); Nicodemas v. Washington Water Power Co., 9 Cir., 264 F. 2d 614 (1959) United States v. Oklahoma Gas & Electric Co., 10 Cir., 127 F. 2d 349 (1942) affirmed 318 U.S. 206) With this in mind and relying upon the cases of the United States ex rel Bay v. Hibner, 27 F. 2d 909, and State v. Johnson, 249 N.W. 284 (Wisc. 1933), the Solicitor in a memorandum dated February 23, 1960, relative to the right of the Coeur d'Alene Indians to

hunt on fee pattented lands, held there is no reserved right vested in the Indian authorizing their hunting or fishing on the land after the land passes out of Indian ownership.

Therefore, the fee patenting of the land to non-Indian removes the land from the reservation and carries with it the right of the non-Indian to hunt thereon and to fish in the stream running through the land as an incident of his ownership. It subjects such hunting and fishing to state jurisdiction. Other non-Indians cannot hunt or fish thereon without the consent of the non-Indian landowner, and such permission, of course, cannot be given by the Indian Tribe, as the land is no longer a part of the Indian reservation.

The treaty reservation for hunting on the unoccupied lands of the United States is not confined to the reservation, but its terms cannot include lands to which the United States has passed title and which are now fee owned and on which the hunting right reserved by treaty no longer exists.

The non-Indian landowner is under state law. He may hunt and fish upon his own land and invite others to do so upon the land, but all must comply with applicable state laws and regulations concerning such matters. Permits must be obtained from the state authorities, and violations will be prosecuted by the state officials. The purchaser or fee owner of Indian land within the reservation is in the same category as any other non-Indian citizen of the state. His acquisition in fee destroys any and all the former rights of the Indians in and to the property, even though the land remains within the exterior boundaries of the former Indian reservation.

There is nothing in the Indian Reorganization Act

which alters the above principles. Fee owned land acquired prior to the passage of the Act, as well as fee owned land acquired after the passage, are both governed by the application of the legal principles above stated.

The owner of the fee owned land should either post or enclose his land in accordance with state law to prevent trespasses thereon and to permit prosecution for trespass under state law. The amendments to Title 18 of U.S.C.A. (74 Stat. 400) relative to posting of Indian lands and hunting and fishing on Indian lands have no application to former Indian lands that have been fee patented or sold to non-Indian landowners.

The title company in its letter of October 23, is concerned with the ownership of an Island in the Snake River, omitted from the original government survey, and now designated as Lots 13 and 14 in Section 31, Township 3, Range 34, East, and Lots 7 of Section 30, in the same Township and range. A map showing the former and present meanders and the location of the island accompanied your memorandum.

The Fort Hall Reservation was established by Executive Order of June 14, 1867. (1 Kappler, Indian Affairs, pages 836-837).

The order describes the reservation boundaries in part as "down the Snake River to the place of beginning". "Along" and "down" the river are synonymous (Sweet v. Irrigation Canal Company, 256 P. 2d 252 (Oregon): Brown v. Huger, 62 U.S. (21 How.) 305, 320). The instant situation is therfore parallel to that in *United States* v. Ahtamm Irrigation District, 236 F. 2d 321, 9 cir), cert. denied 352 U.S. 988, where the description was "along" the river of the non-navigable stream and the court held

that the boundary of the reservation was the center of the stream or river. The boundary of the Fort Hall Reservation is the middle of the Snake River, as apparently that river is not considered to be navigable. (ICA 36-907—1927 designated by Idaho Legislature as navigable to Big Springs.) (Last entry mine. H.T.)

We do not know the facts concerning the formation of the island, but assume that it was always there and was omitted from the original survey. Under such circumstances, the island since it is crossed by the center line of the entire stream is owned in part by the owners of what is designated as Lots 7, 9, and 10 and partly by whoever owns the lands on the other side of the river facing the island. The island belongs in severity to the proprietors on each side. (See Clark on Surveying and Boundaries, 3rd Ed., Section 641 and cases cited.)

We return the submitted correspondence and documents.

For the Regional Solicitor

Johnston Wilson
Attorney

Attachment

CSCohn:JW:dwj

FISH & GAME EXHIBIT No. 115

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington, 25, D.C.

Through: Area Director, Billings, Mont.

Chairmen
Crow Tribal Council

Dear Mr. Chairman:

On August 24, the Crow Tribal Council enacted Resolution No. 149 concerning the regulation of hunting and fishing on the Crow Reservation. The resolution states that hunting and fishing within the boundaries of the reservation have been reserved by treaty for the exclusive benefit of the Crow Indians. It provides that hunting for game birds or game animals or fishing on any land within the Crow Reservation by other than members of the Crow Tribe and their spouses shall be unlawful except with a tribal permit. It also provides that a penalty of not less than $25 nor more than $300, or a sentence of imprisonment for a term of three months shall be imposed for violation of the resolution. The resolution would affect non-Indians and non-member Indians.

We have been unable to substantiate the provision that hunting and fishing on the Crow reservation have been reserved exclusively to tribal members by a treaty with the United States. The treaty of May 7, 1868 (15 Stat. 64); 2 Kapp. 775), by which the reservation was created, provides, in Article 4, that the Indians shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts. The treaty makes no reservation of exclusive rights to the Indians to hunt and fish within the reservation. We have found no other treaty agreement with the Indians ratified by law, or Federal statute subsequent to the 1868 treaty that affords such exclusive rights.

There is a considerable area of fee-patented land within the reservation owned by non-Indians. We are

not aware of any judicial decision that an Indian tribe has the power and authority to prohibit non-Indians owning land within a reservation from hunting or fishing on such land, particularly in the absence of a clearly established exclusive right in the Indians.

Aside from the foregoing, however, the resolution appears to be fatally defective. It purports to subject non-Indians to criminal sanctions imposed by tribal authority. An Indian tribe has no criminal jurisdiction over non-Indians. See Cohen, Handbook of Federal Indian Law, p. 148. The Assistant Secretary of the Interior, in a letter dated June 4, 1954, to the Director of the Minneapolis Area Office of this Bureau, stated as follows: "Section 1 (a) of Article VI of the tribal constitution empowers the Lac du Flambeau Tribal Council to enact ordinances for the protection of fish and game but neither that nor any other provision of the constitution confers jurisdiction on the tribe to enforce criminal sanctions against nonmembers of the tribe. The ordiance, therefore, is ineffective because its intent is beyond the constitutional power of the tribe." In addition, the court in which the criminal sanctions would be enforced is the Court of Indian Offenses maintained under Departmental regulations, 25 CFR, and that court has jurisdiction only over offenses committed by Indians. (See 25 CFR 161.2, and our memorandum of August 30, 1954, a copy of which is enclosed with our letter regarding Ordinance No. 3.) Because Resolution No. 149 is beyond the power of the tribe and is therefore ineffective, we can not approve it. No purpose would be served by its disapproval by the Secretary of the Interior since it is already a nullity.

Sincerely yours,

Commissioner

cc: Branch of Land Operations
Branch of Tribal Programs
Billings Area Office
Crow Agency

FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

No. 79 1128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,
Respondents

V.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTEAD, EARL L. SHERRON JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Certiorari Filed January 21, 1980
Certiorari Granted April 14, 1980

APPENDIX TO BRIEF ON THE MERITS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 78-2917 & 78-2865

THE UNITED STATES OF AMERICA, and
THE CROW TRIBE OF INDIANS,

Appellants,

—vs—

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, *et al.,*

Appellees.

Appeal from the United States District Court
For the Distrrict of Montana
Billings Division
The Honorable James F. Battin

BRIEF OF APPELLEES

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FACTS

The Crow Tribe is not indigenous to Montana or Wyoming. Tribal roots were formed in Canada near the Winnipeg Lake area. They migrated into the area they now occupy in approximately 1700.[9]

There was no pact or treaty between the Crow and other tribes who occupied the Crow territory before that tribe's migration. Crow occupancy was not based upon aboriginal title "from time immemorial."[10]

Almost from the inception of their occupation, the Crow were beseiged from all sides by other warring tribes: The Flatheads and Pend d'Oreilles to the north, the Blackfoot to the north and east, and the Sioux to the east. While the Sioux, a numerically stronger tribe, never did gain permanent possession of the Crow territory, "There is little doubt that eventually they would have done so but for the interposition of governmental authority."[11]

Although the Crow did not have a written language, it did have an extensive vocabulary. The tribe had words for hunting, fishing, elk, deer, trout, and other fish. They also differentiated in their vocabulary between a "right" and a "privilege."[12]

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[9] *The North American Indian,* Edward S. Curtis, Johnson Reprint Corporation, 1909, page 38; testimony of Joe Medicine Crow, tribal historian. Tr., p. 106.

[10] Tr., pp. 150-151, 152.

[11] Op. cit., at p. 40; testimony of Joe Medicine Crow acknowleges population supremacy of the Sioux. Tr., p. 152. The population of the Tribe in 1868 was 4,000 to 5,000. Tr., p. 153.

[12] Op cit.; tr., pp. 100-102, 133-144.

The Crow largely depended upon big game animals or agriculture for subsistence.[13] The first *written* reference to fishing and hunting by the Crow was the result of a council meeting between the Crow Tribe and the Federal Government in May of 1873, which ultimately resulted in a cession of a portion of the reservation in 1882.[14] Testimony and documentary evidence support the lower court's conclusion that fish were not part of the Crow diet.[15] There was no evidence presented that the Tribe depended upon canoes or any type of boat for transportation on the Big Horn River, the Yellowstone, or the other rivers and streams which flowed through their country.

The United States commenced treating with the Crow Tribe in 1825,[16] but that treaty made no reservation of any land.

The next treaty, dated September 17, 1851, created a Crow Reservation[17] of some 38,531,174 acres.[18] Article 5 in part provided that the Indian

[13] The Crow were "a nomadic big-game hunting tribe," centered around the buffalo. Tr., p. 108.

[14] Act of April 11, 1882, 22 Stat. 42; Tr., p. 109; C.T. Ex. 74. At page 506, Blackfoot speaking for the Tribe said: "On this side of the river and on the other side is our country." Ownership of the bed of the river was never specifically addressed, but it is evident that the Indian felt he had no proprietary interest in it.

[15] Masters thesis published by Joe Medicine Crow, May, 1939: "(F)ishing was a dull way of obtaining food according to the Crow." Tr., p. 160; Tr., pp. 207-208; Tr., pp. 219-220; Tr., p. 238; Tr., p. 246; letter of July 31, 1919, U.S. Ex. 10; letter of February 27, 1920, U.S. Ex. 16; Letter of June 2, 1921, U.S. Ex. 19; letter of December 5, 1921, U.S. Ex. 21; letter of February 24, 1922, U.S. Ex. 24.

[16] August 4, 1825, 7 Stat. 266.

[17] *The Crow Nation* v. *United States, supra;* Treaty of Fort Laramie, II Stat. 749; *The Crow Nation* v. *United States,* 81 Ct.Cl. 238, 248 (1935).

[18] *Id.*, at p. 247.

nations "do not surrender the *privilege* of hunting, fishing, or passing over any of the tracts of country heretofore described." (Emphasis supplied.)

On April 30, 1868, W. J. Cullen, Special Agent for Montana was instructed to negotiate treaties with, *inter alia*, the Crow and to effect "their location upon suitable reservation with means to enable them to engage in *agricultural* and other *pursuits*."[19]

On May 7, 1868, the Second Treaty of Fort Laramie was signed and proclaimed by the President on August 12, 1868.[20] The treaty left a reservation to the Crow of approximately 8,000,000 acres and resulted in a cession to the United States of something over 30,000,000 acres.[21] Subsequent acts further reduced the size of the reservation.[22]

Article 1 of the Treaty of 1868 provided, *inter alia*:

> "IF BAD MEN AMONG THE WHITES OR AMONG OTHER PEOPLE, SUBJECT TO THE AUTHORITY OF *THE* United *States*, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.
>
> "If bad men among the Indians shall commit a

[19] *Id.*, at p. 250; emphasis supplied.

[20] 15 Stat. 649.

[21] *United States* v. *Finch*, 548 F.2d 822, 827 (9th Cir., 1976).

[22] 22 Stat 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937).

wrong or deprivation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, and proof made to their agent and noticed by him, deliver up the wrong doer to the United States, to be tried and *punished* according to its *laws*;* * *." (Emphasis supplied.)

Article 2 described the reservation which would be "set apart for the absolute and undisturbed use and occupation of the Indians." The only mention of hunting or fishing rights is contained in Article 4 which provided the Indians "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts."

Although Article 2 of the Treaty of 1868 provided that:

> "No persons, except those herein designated and authorized so to do, and except such officers, agents, and employee's of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, setttle upon, or reside in the territory described in this article for the use of said Indians, and henceforth, they will, and do hereby, relinquish all title, claim or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid,"

the General Allotment Act of 1887[23] and the Crow Allotment Act of 1920[24] specifically provided that

[23] Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. Section 331, *et seq.*

[24] Act of June 4, 1920, 41 Stat. 751.

patents in fee could be issued by the United States to allottees within the Crow Indian Reservation and thus be subject to alienation to non-Indians.[25]

The Treaty was obviously intended to assist the Indians in establishing an agrarian society.[26]

Article 5 of the treaty provided that an Indian agent would reside among the Crow Tribe to inquire:

> "into such matters of complaint, *by and against the Indians*, as may be presented for investigation under the provisions of their treaty stipulations, and also for the faithful discharge of other duties enjoined on him by the law. In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty." (Emphasis supplied.)

The allotment system was initially unilaterally imposed upon the Crow by statute and was designed to

[25] The Acts of April 11, 1882, 22 Stat. 42; March 3, 1891, 26 Stat. 989; February 12, 1889, 25 Stat. 660; March 1, 1893, 27 Stat. 529; June 4, 1888, 25 Stat. 167; March 3, 1887, 24 Stat. 545; April 27, 1904, 33 Stat. 352; May 25, 1918, 40 Stat. 461; June 4, 1920, 41 Stat. 751; April 14, 1926, 44 Stat. 251; April 14, 1928, 45 Stat. 429; August 31, 1937, 50 Stat. 884; July 15, 1958, P. L. 85-523, not only diminished the reservation but also encroached markedly upon exclusivity within that reservation. For example, railroads were authorized; public schools under Montana jurisdiction were granted lands for "public school purposes"; the State of Montana was granted sections 16 and 36 within the reservation; public roads were financed, "provided Big Horn County participated"; Custer Battlefield and other lands were conveyed to the United States; and Yellowtail Dam Site was "taken," despite Section 10 of the Allotment Act of 1920. Each of the above acts clearly violated express provisions of the Treaty of 1868. See *Lone Wolf* v. *Hitchcock*. 197 U.S. 533 (1903): and cf. *Confederated Salish & Kootenai Tribes* v. *United States*, 437 F.2d 458 (Ct.Cl., 1971).

[26] Articles 3,6,8,9, and 10.

integrate the Indian into white communities and, by close association with his white brother, to ultimately lead to an amalgamated or homogenized society.[27]

The Crow Allotment Act of 1920 had a similar purpose but was actively supported by the Tribe.[28] The allotment philosophy, of course, was terminated

[27] See concurring opinion of Justice Washington, *Worchester* v. *Georgia*, 31 U.S. (6 Pet. 515), 105 S.Ct. at 271 (1832); Cohen, *Handbook of Federal Indian Law*, 1942, pages 208-210; *Quinault Allottee Association* v. *United States*, 45 F.2d 1391, 1396-1397 (Ct.Cl. 1973), cert.den. 416 U.S. 961.

[28] "This bill contemplates the allotment among the members of the Crow Tribe of the unallotted lands within their reservation in the State of Montana, save a limited area too rocky and mountainous for cultivation, *and the distribution among them of the common property of the Tribe. It is in accordance with the policy to which Congress gave its adherence many years ago, and which found expression in the Dawes Act, approved February 8, 1887.* The commission as a result of whose work that act was passed, reported that the Crows numbered about 3,500. The Tribe has since dwindled to 1,710, as shown by the last report of the Commissioner of Indian Affairs, a fact which constitutes eloquent but tragic confirmation of the view expressed by the Commission that the *communistc* tribal system ought, in, the interest of the *Indians, to be abandoned* as speedily as *possible.*

"In its general features and in almost every detail, this bill has the approval of the Indian Bureau and of the Indians, to their regularly constituted representatives, who attended the hearings conducted by the committee and who rendered very substantial aid in the preparation and perfection of the bill.

"Under previous acts of Congress, allotments were made to heads of families of 320 acres and to others of 260 acres. This process of equalizing allotments will first be made until each Indian shall have received 320 acres of land. Thereafter, the remaining lands are to be divided equally among the members of the tribe, so that each will become the owner of approximately 1,000 acres of land. Out of this each will be required to select a homestead of 320 acres, which is to be inalienable for 25 years. The remainder may be sold by the Indian owner, but only with the approbation of the Secretary of Interior in case of incompetent Indians." Senate Report No. 219, 66th Congress, 1st Session.

to a large extent by the Indian Reorganization Act of 1934.[29] The allotment philosophy is part of the historical backdrop against which the issues in this case must be decided.

[28] Continued:

Congressman Riddick, one of the authors of the Crow Allotment Act of 1920, in urging its passage, stated:

"Of the 1,000 or more acres that will be allotted to each Indian, there is a provision that 320 acres of his land shall not be sold for a period of 25 years. With the additional money that will go to these Indians from the rental or sale of their surplus lands, all competent Indians may undertake the managment of their own affairs under the most favorable circumstances. ***

"Section 1 indicates what lands shall be allotted and the procedure of making the division. About 4000,000 acres of mountainous grazing land is reserved from allotment for grazing land for the tribal herd, the balance *is* all to be *allotted.*" 66th Congress, 2nd Session, April 22, 1920, Congressional Record, 1920, p. 6493.

Commenting further, Congressman Riddick quoted from Frank Yarlott, an Indian who spoke for the Tribe, as follows:

"As the bill now stands, it has the unqualified endorsement of the entire tribe.

"To the educated Indians who have closely watched events this seems the best solution to the long vexed "Indian problem." This means the gradual influx of white *settlers* with whom the Indians will become acquainted and *gradually* absorb their methods of farming and cattle raising. *They* will come to understand the white temperament *gradually* and be *friends.*

" 'It is the hope and desire of the Indians that their white friends will support this bill, as there was perfect harmony between the Indian Committee, the Office of Indian Affairs, and the Crow Delegation. They are also anxious for the development of the reservation and believe this plan is best for all concerned.' " *Id.*, at p. 6494. (Emphasis supplied.)

[29] See U.S.C. Section 461, *et seq.*

B. *History of Acquisition by the United States and the State of Montana of Crow Territory.*

The first non-Indian sovereign which claimed the territory which now encompasses the Crow Indian Reservation was Spain under the Treaty of Tordesillas, which was concluded in 1494 between Spain and Portugal. At the time this treaty was signed, the Crow had not migrated into the reservation area. By that treaty, Spain received all lands west and south of an imaginary line drawn 370 leagues west of the Cape Verde Islands.[30]

By the Treaty of San Ildefonso of October 1, 1880, Spain ceded what was then referred to as the Louisiana Territory back to France.[31]

The United States obtained title to the Louisiana Territory in 1803 by virtue of the Louisiana Treaty.[32] Paragraph 3 of that treaty guaranteed:

> "The inhabitants of the ceded territory shall be incorporated in the United of the United States, *and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages and immunities of citizens of the United States; and in mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.*" (Emphasis supplied.)

[30] Samuel Flag Bemis, *A Diplomatic History of the United States,* p. 4 (N.Y., 1953); see also Appraisal Report Before the Indian Claims Commission, Docket No. 54, *The Crow Tribe of Indians* v. *The United States of America,* Norman B. Plummer, p. 27. (Appendix to Appellees' Proposed Findings of Fact and Conclusions of Law)

[31] Bemis, *supra,* at p. 128; Appraisal Report, *supra,* at p. 28.

[32] April 30, 1803, proclaimed October 21, 1803, 8 Stat. 200.

By the Act of March 3, 1811, 33 U.S.C. Section 10, Congress provided:

> "All the navigable rivers and waters in the former Territories of *Orleans and Louisiana shall be and forever remain public highways.*" (Emphasis supplied.)

Both our courts and Congress have recognized that the object of the Louisiana Treaty was "to be the formation of new states."[33]

The Nebraska Territory was created on May 30, 1854, and the Crow cession in the present State of Montana was included in the Dakota Territory which was carved out of the Nebraska Territory on March

[33] *United States* v. *Brewer-Elliott Oil & Gas Co.*, (D.C. Okla.) 249 F. 609, 612, aff'd 270 F. 100, aff'd 260 U.S. 77 (1922); 20 Congressional Record, House, 815:

"We see, upon examination, that the ordinance of 1787 and the Louisiana treaty have been successfully and repeatedly used as authority for the right of new States to be admitted to the Union. No better authority or language regarding the *duty of Congress to admit new states need be given* and the following from Chief Justice Taney in the Dred Scott case (19 How., 446):

" '*** There is certainly no power given by the Constitution to the Federal Government to establish and maintain colonies bordering on the United States, or at a distance, to be ruled and governed at its own pleasure, nor to enlarge its territorial limits in any way except by the admission of new States. That power is plainly given, and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State and the Federal Government. *But no power is given to acquire a Territory to be acquired and held permanently in that character.*' " (Emphasis supplied.)

See also Senate Report No. 75, January 23, 1888 (U.S. Ex. 4-E at pp. 12-13); H.R. Report No. 1025, March 13, 1888 (U.S. Ex. 4-F).

2, 1861.[34] Subsequently, the Territory of Idaho was created from eastern Washington and western Dakota, which included all of the present State of Montana. On January 16, 1864, that territory established the future Montana counties of Missoula, Deer Lodge, Dawson, Beaverhead, Madison, Jefferson, Choteau, and Big Horn.[35]

"The mining boom of 1862 and 1863 led to the creation of the territory of Montana on May 26, 1864," and on December 12, 1864, the Territorial Assembly at Bannack immediately adopted "the counties created by the Idaho legislature* * *(with) the Crow cession* * *located in Gallatin, and Big Horn counties."[36]

Although Congress nullified these original acts, they were recreated by the legislature of 1867.[37] "Thus, on the date of the treaty (of May 7, 1868) the Crow cession in the territory of Montana was located in Big Horn, Gallatin, Meagher, and Muscleshell counties."[38]

Although the Organic Act[39] for the Territory of Montana provided:

> "[N]othing in this act contained shall be construed to impair the rights of persons or property now pertaining to the Indians in said territory so long as such rights remain unextinguished by

[34] Appraisal Report, *supra*, at p. 31.

[35] *Id.*, at p. 34.

[36] *Id.*, at p. 35.

[37] *ID.*, at p. 36.

[38] *Id.*, at P. 36.

[39] Act of May 26, 1864, 13 Stat. 85.

treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territory limits or jurisdiction of any state or territory; but all such territories shall be excepted out of the boundaries, and constitute no part of the territory of Montana, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed.[40]

The Enabling Act of Montana substantially changed the language of 1864:

> "That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribe; *and that until the title thereto shall have been extinguished by the United States, the same shall be and remain* subject to the disposition of the UnitedStates, and said Indian lands shall remain under the ab-

[40] Unlike the treaties with the Choctaw and Cherokee Indians, the Treaty of 1868 contained no provision excluding reservations from future states. Compare Treaty of Dancing Rabbit Creek, September 27, 1930, F & G Ex. 67, and Treaty of New Echota, December 29, 1935, F & G Ex. 68, each of which do have such provisions.

solute jurisdiction and control of the Congress of the United States;* * *." (Emphasis supplied.)[41]

Section 10 provided that sections 16 and 36 would be granted the State upon admission to the Union, but that the same sections which were "embraced in Indian" reservations would not be subject to the indemnity provisions of the act, "until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain."[42] Section 16 of the Crow Allotment Act granted to the State of Montana for common school purposes section 16 and 36 for a total of 45,041.72 acres.[43] It has been agreed that 30.29 percent of the approximate 2.3 million acres within the reservation or approximately 700,000 acres is presently owned in fee by non-Indians.[44]

C. *Exercise of State Jurisdiction within the Reservation.*

While the Tribe and the United States attempted to show that the Tribe has continually exercised jurisdiction over hunting and fishing activities on the reservation, the weight of the evidence (and the

[41] Act of February 22, 1889, 25 Stat. 676.

[42] *Id.*, Section 10.

[43] *Federal and State Indian Reservations*, United States Department of Commerce, United States Government Printing Office, 1974, p. 271; in *Rosebud* v. *Kneip*, 430 U.S. 584, 599-600 (1977), this type of provision was seized upon as indicating congressional intent to disestablish a reservation.

[44] The United States continues to issue fee patents to members of the Crow Tribe within the Crow Indian Reservation, thus providing the legal basis by which reservation lands can be conveyed to non-tribal members. (United States supplementary answer to interrogatory no. 79, Record, p. 893.)

court so found, Record, pp. 1251, *et seq.)* clearly supports a conclusion that in matters of law enforcement involving non-Indians (and, on occasion, tribal members) within the reservation, the County Attorney of Big Horn County, located in the county seat of Hardin, a community just outside the exterior boundaries of the reservation, has exercised near exclusive jurisdiction in prosecuting non-members for offenses committed on fee lands within the confines of the reservation.[45] Montana Department of Fish and Game wardens patrolled the reservation and cited non-Indians for fish and game violations, whether or not those violations took place on tribal, trust, or fee lands. Throughout the period of time up to approximately 1973, there were no real confrontations regarding jurisdiction. While during that time, the Tribe did express some dissatisfaction with non-member hunting and fishing activity within the reservation, the Tribe, the Federal Government, and the State understood that:

(1) The State had exclusive jurisdiction over non-member hunting and fishing violations on fee patent lands;

(2) The Federal Government had concurrent jurisdiction over non-members fishing and hunting without permission on tribal or trust properties;

(3) The Tribe neither had not exercised any

[45] Testimony of Chet Duffy, Tr., pp. 310 *et seq.;* Don Wright, Tr., pp. 368, *et seq;* Bert Kronmiller, Tr., pp. 386, *et seq.;* Douglas Freeman, Tr., pp. 394, *et seq.;* James Seykora, Tr., pp. 400, *et seq.;* Medicine Crow, Tr., pp. 160, *et seq.*

jurisdiction over non-member hunting and fishing activities within the reservation.[46]

When some complaint was made about non-member intrusion upon tribal or trust properties, the tribal member would generally contact the state game warden who in turn would enforce the law.[47] There were no real problems which arose during this pre-1970 period.

The position taken by the Commissioner of Indian Affairs in 1957 in a letter to the Chairman of the Crow Council appears to state the understanding of all the various parties who exercised some jurisdiction within the Crow Reservation, at least prior to this lawsuit:

> "There is a considerable area of fee-patented land within the reservation owned by non-Indians. We are not aware of any judicial and authority to prohibit non-Indians owning land within a reservation from hunting or fishing such land, par-

[46] This construction of the law is supported by numerous exhibits: Letter from C. E. Lamson, for the Commissioner, to Eli W. Nelson, April 29, 1947, F & G Ex. 4; letter from L. C. Lippert, Superintendent, to Otto Wesley Bear Ground, Tribal Game Warden, dated April 30, 1952, F & G Ex. 5; letter dated October 25, 1923, from Superintendent Asbury to the Commissioner of Indian Affairs; letter dated 1957 from Commissioner of Indian Affairs to Chairman of the Crow Tribal Council, F & G Ex. 115.

Although Appellant and the Tribe rely upon a number of letters and other documents which address hunting and fishing within the Crow Reservation (U.S. Exs. 5-28), these letters and documents all relate to a period of time when Section 2137, Revised Codes, was still law. Section 2137 proscribed hunting in Indian country except for purposes of subsistence. Furthermore, even then the dichotomy between fee and Indian land was recognized. See, e.g., U.S. Ex. 12.

[47] Tr., p. 319.

cularly in the absence of a clearly established exclusive right in the Indian."[48]

While there is a great deal of correspondence between the Tribe and the Department of Fish and Game with regard to opening or closing the entire or parts of the reservation to hunting,[49] there was little or no correspondence until approximately 1973 with regard to fishing. Moreover, in regard to hunting season restrictions or game restrictions, the procedure was for the Tribe to make a request to the Department of Fish and Game to close or restrict hunting or open, as the case may be, and the Commission acting upon that request.[50]

After the enactment of Public Law 86-634,[51] questions developed as to the relative jurisdiction of the Federal Government and the states over fishing and hunting within the reservation. On August 15, 1960, the Field Solicitor in Billings, Montana, rendered his opinion that: "Prosecution under Section 1165 would not appear warranted for hunting or fishing on fee or deed land."[52]

[48] F & G Ex. 115.

[49] See, e.g., memorandum from Starina, to Lewis dated October 14, 1959, closing deer season within the Crow Indian Reservation.

[50] See, e.g., memorandum from Starina, to Lewis dated October 14, 1959, closing deer season within the Crow Indian Reservation; F & G Ex. 8.

[51] Act of July 12, 1960, 74 Stat. 869, 18 U.S.C. 1165.

[52] Letter dated August 15, 1960, from A. E. Bielfeld to Area Director, Indian Affairs, Billings, Montana, F & G Ex. 9a.

From the enactment of P.L. 86-634[53] to the inception of this action and even beyond that period of time, there was solid agreement between the Tribe, the Federal Government, and the State of Montana that 18 U.S.C. Section 1165 controlled hunting and fishing by non-Indians only upon tribal and trust lands but did not extend to non-Indian fee patented land which remained under the exclusive jurisdiction of the state.[54]

Since at least 1928, the State of Montana has engaged in an extensive fish stocking program

[53] "Whoever, without lawful authority or permission, willfully and knowingly goes upon *any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use,* for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited." 18 U.S.C. Section 1165. (Emphasis supplied.)

[54] Letter dated March 13, 1961, Kohler to Lewis, F & G Ex. II; letter dated June 13, 1963, to Weaver, Superintendent of Crow Agency, from Don L. Brown, Fish and Game Department, F & G Ex. 15; letter dated December 9, 1964, to West from Kohler, F & G Ex. 17; office memorandum of Department of and Game dated June 18, 1965, F : G Ex. 19; Fish and Game memorandum dated August 10, 1965, F & G Ex. 20; compare letter of July 22, 1966, from Allan T. Studholme, Bureau of Sport Fisheries, to Regional Director, F & G Ex. 24; Fish and Game memorandum dated October 16, 1966, F & G Ex. 27; Fish and Game memorandum dated May 15, 1973, F & G Ex. 41; letter to Chairman, Crow Tribal Council, from Chairman, Montana Fish and Game, dated February 28, 1975; Resolution No. 253, August 8, 1959, relating to "tribal areas," F & G Ex. 57; compare Cooperative Agreement between the Crow Tribe and Fish and Game, F & G Ex. 58; letter to Ausland from Wright, Fish and Game, dated October 5, 1972, F & G Ex. 97c; letter dated October 19, 1964, from Commissioner of Indian Affairs to John Cragun, attached as an addendum to this brief;

throughout the waters of the Crow Reservation.[55]

In addition, the State Department of Fish and Game has conducted extensive studies on the Big Horn River, and neither the Tribe nor the Bureau of Indian Affairs have objected to such studies. Brown and Rainbow Trout in the Big Horn, Little Horn, and other streams in the reservation were initially introduced by the Department of Fish and Game.[56]

The Department of Fish and Game assumed pervasive control of the Big Horn River because it was navigable and was, therefore, owned by the State of Montana.[57]

The Reservation has become a haven for upland game birds. The Ring-necked Pheasant, Wild Turkey, and Chukkor Partridge with which the reservation is now well-stocked were all introduced

letter dated November 20, 1973, to Chairman, Crow Tribal Council, from Canan, Area Director, Bureau of Indian Affairs, F & G Ex. III:

"It appears that fee status lands even though they are within the exterior boundaries of the reservation, were not included in the coverage of this act. Therefore, the enforcement of Section 1165 on such fee land by Bureau of Indian Affairs or Tribal enforcement officers would not be authorized or prosecuted by the United States Attorneys Office.

"The State of Montana Fish and Game has indicated that they would be glad to meet with the tribal officials to discuss possible closure of fee land on the Reservation to all hunting and fishing and particularly the mountain areas and the areas around Bighorn Lake."

See also testimony of Douglas Freeman, Tr., pp. 405-407.

[55] F & G Ex. 100; literally millions of fish have been planted by the Fish and Game Department. See also exhibits introduced by the Big Horn Rod & Gun Club consisting of newspaper articles from the *Hardin Herald.*

[56] Tr., p. 346.

[57] Tr., pp. 349-350.

by either non-Indians or the Montana Department of Fish and Game.[58] In addition, the Department has stocked game animals in areas adjacent to the reservation, such as Bighorn Sheep, which have migrated onto the tribal mountain areas and have been hunted and killed by Indian hunters.

The tribal historian, Joe Medicine Crow,[59] testified that the Tribe respected fee-patented land and the right of its owner to exclude Indians. The Tribe recognized that within those bundle of rights" which a landowner possessed within the reservation was the right to hunt and fish free from non-state regulations.[60]

The Tribe's historian conceded that when land was ceded to the United States, included within the cession were all constituents of land value "minerals, trees, grassland, and those elements of nature that are perceptible with the five senses* * *fish and game."[61] There was no retention of political control

[58] Tr., p. 351. Rod and Gun Exs. 18, 19, 20, 23, 28, 29, 30, 32, 33, 34, 35, 40, 43, 47, and 54. See also Rod and Gun Exs. 4, 5, 8, 15, 25, 26, 36, 38, 39, 41, 42, 43, 44, 45, 46, 47, 49, 54, 57, 58, 59, 60, and 61, which illustrate that fishing and hunting were being openly pursued within the Crow Reservation without protest from either the Tribe or the BIA. Other articles reflect that the Big Horn Rod and Gun Club requested the Fish and Game Commission to open the Big Horn River for year round fishing and to control goose hutning for conservation reasons. Rod and Gun Exs. 21, 22, and 40 illustrate the common concept prevailing at the time: The mountain area — some 400,000 acres set aside for tribal purposes (Section 1, Crow Allotment Act of 1920)— was closed to hunting by Superintendent Robert Yellowtail. Rod and Gun Ex. 55 reflects that the reservation superintendent felt it was legal to hunt on the reservation.

[59] Tr., p. 352.

[60] Tr., p. 150.

[61] Tr., p. 144.

over the lands ceded.[62]

Since 1872, the Tribe has sent delegations to Washington to negotiate with the United States. These delegations were present prior to passage of the Acts of 1904 and 1920 and the passage of the Yellowtail Dam Act in which their lobbyists were successful in reserving to the tribal members permission "to hunt and fish in and on Yellowtail Reservoir and taking area without a license."[63]

Although the Tribe's historian had searched tribal and court records, he could not find a single instance in which a non-member was prosecuted by any agency, Indian or federal, for hunting or fishing on fee patented land.[64] "I guess, although it doesn't spell it out, the exact bundle or rights that a man acquires after he purchases the land, it is implied that he can hunt and fish or regulate such activities on his own fee land."[65] This is the concept that the Tribe has operated on since 1920.[66]

All land riparian to the Big Horn River below the Yellowtail Dam take area has been allotted, except for 2 or 3 40-acre tracts reserved for recreational purposes.[67] Theoretically, all of that land could be owned by non-Indians.[68]

[62] Tr., p. 144.

[63] Tr., pp. 143, 144, 162-163; F & G Ex. 60, "Joint Resolution," subsection (d).

[64] Tr., p. 160.

[65] Tr., p. 150.

[66] Tr., p. 150.

[67] See Section 5, Crow Allotment Act of 1920, Tr., p. 149.

[68] Tr., pp. 148-149.

D. *Yellowtail Dam—Its Impact upon the Big Horn River Fishery.*

On July 15, 1958, Congress passed Public Law 85-523 providing for the transfer of right-of-way for Yellowtail Dam and Reservoir and payment to the Crow Tribe in connection with the taking.[69] The resolution provided for the payment of $2,500,000.00 to the Tribe but left open the question of:

> "whether an amount additional to that specified in section I hereof is due as just compensation* * *. Nothing contained in this joint resolution shall be taken as an admission on the part of the United States that just compensation is required for any particular element of value, including powersite damsite value, now or hereafter claimed by the Crow Tribe, but the same shall be determined in accordance with the Constitution and laws of the United States.

In *United States* v. *5,677.94 Acres of Land, etc.*, 162 F. Supp. 108 (D.C. Mont., 1958), The United States condemned the land. The question of whether or not the river was navigable was reserved. Subsequently, in the *Crow Tribe of Indians of Montana* v. *The United States of America*, Civil No. 214, the court determined that the river was in fact navigable.

It was the Tribe's position in that suit that the Big Horn River was non-navigable because if the river was non-navigable, then riparian owners, under federal common law, which applied state rules of construction, would own to the middle of the

[69] Joint Resolution dated July 15, 1958, 72 Stat. 361.

stream.[70] If the court had adopted that position, the Tribe's ownership of both the bed and banks of the river would have been guaranteed. The court determined the river was navigable but, in awarding compensation,[71] was not required to determine ownership. Based upon the power value site itself, [72] the court awarded the Tribe the sum of $4,500,000.00 or $2,000,000.00 over the congressional authorization.

In his opinion, Judge Jameson noted that the United States had acquired:

> "the lands for a site for Yellowtail Dam and Reservoir, a multi-purpose dam designed to 'provide for irrigation, flood control, power generation, silt retention, improvement of fish and wildlife resources, recreational opportunities, municipal industrial water and other benefits.''[73]

From at least 1962 on, both the Montana Department of Fish and Game and the United States Department of the Interior, Fish and Wildlife Service represented that among the public benefits flowing from Yellowtail Dam and Reservoir would be the improvement, if not creation, of a new trout fishery.[74] It was represented in each of the various reports promulgated by both Montana and federal agencies that the Big Horn River below the dam would be

[70] See, e.g., *Oklahoma* v. *Texas*, 258 U.S. 579 (1921); *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799 (19____); *United States* v. *Twin Power Co.*, 350 U.S. 222 (19____); and *United States* v. *Virginia Electric Co.*, 365 U.S. 624, 627-628 (19____).

[71] Court's opinion dated October 1, 1963, the Honorable William J. Jameson.

[72] Section 10, Allotment Act of 1920.

[73] Page 1 of the court's decision dated October 1, 1963.

[74] F & G Exs. 13, 16, 22, 31, 32, 33, 34, 37, and 95.

open to public recreation and fishing and that the State of Montana would commence a program to obtain access to the river itself.

In his report dated January 25, 1966, Clint Bishopt, Distict Fishery Manager for the Department of Fish and Game, stated that the river would be "opened to sport fishing with hook and line the year round. The policy regulations will be to allow the maximum opportunity possible for recreation fishing."[75]

In his memorandum of November 17, 1970, R. W. Burwell, Regional Director, Bureau of Sports Fishery and Wildlife, stated:

> "The Big Horn River trout fishery downstream from Yellowtail Dam is *outstanding* at the present time. It attracts not only Montana fishermen but many from other states. Development of this excellent fishery was predicted in our report of February 5, 1962, on the Yellowtail Unit *and benefits were assigned accordingly.* They were based on the understanding that during the initial years of development, there would be stable flows below the afterbay dam of about 2,500 cfs during the fall and winter months rising to a maximum flow of about 2,000 cfs in August." (Emphasis supplied.)

In the document entitled "Yellowtail Unit, Montana and Wyoming, Fish and Wildlife Resources," published by the United States Department of the Interior, Fish and Wildlife Service, in February, $962,[76] strong emphasis was placed upon the fact

[75] F & G Ex. 22 under the heading "Fishing Regulations in Reservoir and River."

[76] F & G Ex. 95.

that construction of Yellowtail Dam would have a beneficial effect upon the downstream fishery and create a cold-water trout fishery where before none existed. Throughout the report are references to public benefits attributed to improvement of the fishery below the dam, and although access was considered a problem—there being little in the way of fee patented land along the river; nevertheless the clear import of the report pointed to a public fishery—one owned by the State.

Is is noteworthy that the Joint Resolution, Section 2(d), provided: "The members of the Crow Tribe of Indians of Montana shall be *permitted* to hunt and fish in and on the Yellowtail Reservoir and taking area without a license." (Emphasis supplied.) It was quite evident that one of the constituent values "taken" when Congress passed the resolution was any tribal hunting and fishing rights. Otherwise, any reference to survival of those rights would be redundant.

It was approximately 1966 when a recommendation was made by Field Solicitor Bielfeld to the Area Director of Indian Affairs that:

> A well-supported program to develop the resources of the Big Horn River would do much to bullwark the Crows' claim of title to the bed of the river. A do-nothing attitude would suggest that resources are not important to the needs or advancement of the tribe."[77]

It appears that that type of recommendation triggered the Tribal Chairman's letter of October 2, 1970, to Senator Mansfield, advising the senator that the Crow Tribe was "now assuming the

[77] Memorandum dated February 16, 1966, to Area Director from Field Solicitor, F & G Ex. 23.

management of their own reservation fish and wildlife resources" and requesting assistance form the Bureau of Sports Fisheries and Wildlife. This letter was followed by the Bureau's letter to Representative Julia Hansen of November 27, 1970, advising her of the excellent "fishery in the Big Horn River below Yellowtail Dam" and the interests of the Bureau that the fishery "be maintained and extended further downstream." It was in 1970 that the Bureau first formed an agreement with the Tribe for federal assistance in fish and game management. It is noteworthy, however, that in its annual report dated February 2, 1978, the Bureau stated:

> "The Crow Indian Reservation continues to remain closed to non-Indian hunters and fishermen. Since relatively few Crow Indians actively engage in fishing, stocking of reservation waters has been significantly reduced." (Emphasis supplied.)[78]

E. *Patented Fee Lands in the Reservation.*

The State of Montana purchased 2 tracts of land riparian to the Big Horn River "to provide the public with fishing access to the Big Horn River."[79] The land has been part of an allotment, and the patent to Montana's non-Indian predecessor in interest states: "That a fee simple patent issue to the claimant F. M. Heinrich, Purchaser of land included in the allotment of Muskrat," and granted to Heinrich "all the rights,

[78] C.T. Ex. 70a. Although the Bureau reached agreement with the Tribe in 1970, they did not do anything definitive until 1976. The tribal resolution approving the agreement (70-51, C.T. Ex. 70b, Appendix F) stated: "The Crow Tribe is interested in promoting the recreation and fishing use by *non-Indians* of the Big Horn River below Yellowtail Dam." It was shortly after this that the Tribe *closed the reservation to non-Indians.*

[79] Pre-trial Order, Agreed Facts, Record, p. 966.

privileges, immunities, land appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heris and assigns of the said claimant forever.[80]

Other patents to state lands acquired pursuant to the Crow Allotment Act of 1920 included language that the grants were made pursuant to, *inter alia*, the Act of February 22, 1889, admitting the State of Montana to the Union.[81]

State Senator Carroll Graham, a non-Indian rancher and farmer, owned land on both sides of Lodge Grass Creek, a non-navigable stream, within the reservation. His patents contained no restrictions, and he has always operated on the assumption that he had the right, subject to Montana laws, to fish and hunt on his fee patented land, free from federal or tribal restrictions. His land descriptions include the bed of Lodge Grass Creek, and he pays taxes on that land, as well as the rest of his lands.[82] Other ranchers have built reservoirs on their land and stocked them with trout.[83]

[80] Appendix B to Pre-trial Order, Agreed Facts, Tr., p. 966.

[81] See F & G Exs. 70, 71, and 72; cf *Rosebud Sioux Tribe* v. *Kneip*, *supra*, 430 U. S. at 673.

[82] Tr., pp. 282-292.

[83] Tr., pp. 215-216.

* * *

VIII.

THE PRIVILEGE TO FISH AND HUNT IS A RIGHT PROTECTED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. *The Crow Tribal Constitution and By-Laws* [204] *Restrict Membership to Duly Enrolled Members of the Crow Tribe.*

It was the Crow Tribal Council, created by the Crow Constitution, which passed Resolution No. 74-05 on October 13, 1973. There was federal approval to that resolution from James F. Canon, Area Director, Bureau of Indian Affairs.[205] Non-Indians cannot and do not participate in the Crow political process.[206]

B. *The Right to Fish and Hunt is a Property Right.*

Both the Tribe and the United States concede that the right to fish and hunt within the confines of the reservation is a property right.[207] However, whether or not hunting and fishing can be denominated a

[204] Crow Tribe Exhibit 74a.

[205] Letter of November 20, 1973, from James F. Canan to David J. Stewart, Chairman, Crow Tribal Council; Crow Tribe Exhibit 71-r.

[206] Tr., pp. 291-292.

[207] United States brief, p. 48: "The exclusive right of the Tribe is a property right"; Tribe's brief, pp. 49-50; cf. *Menominee Tribe* v. *United States, supra,* 391 U.S. at 413; and *Kimball* v. *Callahan,* 493 F.2d 564 (9th Cir., 1974).

"right" or a "privilege" is immaterial from the standpoint of due process or equal protection. Compare *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971).

C. *Regulation of Hunting and Fishing Rights Must Be Rational, or it Violates Equal Protection Gaurantees.*

Baldwin v. *Montana State Fish ‡ Game Commission*, ___U.S.___, 56 L.Ed. 354 (1978), concluded, in denying Fourth and Fourteenth Amendment challenges, that so long as state regulation or fishing and hunting is "rational," it passes constitutional muster.[208] Surely, Crow legislation dealing wtih the same subject matter must at least meet *Baldwin's* constitutionality standards.

In *Baldwin*, the Supreme Court upheld the constitutionality of a Montana statute which charged non-resident hunters higher fees than it did its resident hunters. Rationality of the legislation in a Fourteenth Amendment setting was confirmed because non-resident hunters create greater enforcement problems.[209] However, in this case, lawful residents of the State of Montana, within whose borders the Crow Reservation is located, who own land on the crow Indian Reservation and thus are also residents of that reservation, are totally precluded from hunting and fishing even on their own land within the reservation. Although the total proscription of hunting and fishing within the reservation was supposedly predicated upon a shortage of fish and game, the record totally fails to support that conclusion. The trial court found that the Crow Tribe

[208] *Id.*, at 370.

[209] *Id.*, at 370.

was not dependent upon fishing as a source of food.[210] Moreover, the record is replete with evidence that upland game birds, deer, elk, and big horn sheep flourish on the reservation because of Montana's fish and game conservation and planting programs. Unlike the situation in *Baldwin*, where the record proved that the elk were basically situated in Montana and thus Montana had a parochial interest in maintaining the number of that natural resource in Montana, the tribal elk herd ranges into Montana and Wyoming and spends most of the summer in off-reservation feeding areas.[211]

As has already been reflected upon at page 6-8 of this brief, the United States, in treating with the Crow, did not preserve Crow sovereignty nor did it create any Crow sovereignty over non-Indians. To that extent, following the teaching of *Oliphant*, the Tribe's right to regulate non-Indian activity on non-Indian land was implicitly divested.[212]

As reflected upon above, non-members are not permitted to vote in tribal elections or at tribal council meetings. Yet the resolution is a legislative act of the Tribal Council that purports to divest non-members of their property rights. Under traditional constitutional concepts, such action is proscribed by

[210] That finding is conclusive in this court unless clearly erroneous. *Beaver* v. *United States*, 350 F.2d 4, 7 (9th Cir., 1965).

[211] See "FACTS," *infra*.

[212] See, e.g., *United States* v. *Wheeler*, ___U.S.___, 55 L.Ed.2d 303 (1978); *Oliphant* v. *Suquamish Indian Tribe*, ___U.S.___, 55 L.E.d.2d 209 (1978).

the due process and/or equal protection guarantees of the Fifth Amendment.[213]

The unique relationship which preserved the employment preference in *Morton* v. *Mancari, supra,* obviously does not cover the blanket discrimination against non-members involved in this case. While in *Finch, supra,* 548 F.2d at 835, this court held that the reasons for "sustaining the statute specially applicable to the Indians in that case is equally applicable to the tribal ordinance at issue here," the analogy is not apt. In *Mancari* and *Moe*, nothing was taken from non-Indians. Rather, the court approved a super preference for employment in the Bureau of Indian Affairs in *Mancari* and in *Moe* upheld an Indian exemption from state taxation.

In this case, the Tribe has divested non-Indians' property rights which were conveyed to them by the United States.[214] The Indians possess or have the beneficial use of purchase money but are preventing full enjoyment of what they sold based upon purely specious reasons without record support.

The Supreme Court has declared unconstitutional state and territorial legislation which discriminated between citizens and non-citizens of the state or territory. *Toomer* v. *Witsell*, 334 U.S. 385 (1948); and *Mullaney* v. *Anderson*, 342 U.S. (1952). It has also struck down legislation which totally proscribed non-

[213] *Kramer* v. *Union Free School District*, 394 U.S. 621 (1969); *Cipriano* v. *City of Huoma*, 395 U.S. 701 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); and cf. *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964).

[214] In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 544-546 (1972), the Supreme Court emphatically stated that the Fourteenth Amendment includes within the scope of its protection property rights. Fourteenth Amendement protections are embraced within the Fifth. See pp. 33-37, *infra.*

citizens from obtaining commercial fishing licenses as violating the Fourteenth Amendment. *Takihashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948). In *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, the court struck down discriminating state legislation and said: "[a] statute that leaves a state's residents free to destroy a natural resource while excluding aliens or non-residents is not a conservation law at all."[215] Guided by these precedents, the tribal resolution cannot pass constitutional muster and must be declared unconstitutional.

IX.

THE TOTAL PROSCRIPTION AGAINST NON-MEMBER HUNTING AND FISHING WITHIN THE CROW RESERVATION VIOLATES THE INDIAN CIVIL RIGHTS ACT

Since the Supreme Court decided *Oliphant, supra*, and *Santa Clara Pueblo* v. *Martinez*, ____u.s.____, 56 L.Ed.2d 106 (1978), it is questionable whether the Indian Civil Rights Act includes within its ambit non-Indians. Certainly, the congressional history of that act does not indicate it was to include non-Indians. A portion of the legislative history of the Indian Civil Rights Act is contained in F & G Exs. 101(a) through 101(i). Throughout the congressional hearings on the Indian Civil Rights Act, it was evident that the focal point of congressional interest was the deprivation of Indian civil rights by other Indians. At no time did the committee express any concern over protecting the rights of non-Indians on reservations.

[215] 431 U.S. at 285, n. 21.

However, Section 1302 of the Act provides that:

> "No Indian tribe in exercising powers of self-government shal * * * (5) take any private property for a public use without just compensation; * * *
>
> (8) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;" (Emphasis supplied.)

Courts have held that this section applies equally to non-Indians. *Dry Creek Lodge, Inc.* v. *U. S. C.*, 515 F.2d 926 (C.A. 10th, 1975).

If we utilize the equal protection standard established by the Supreme Court vis-a-vis hunting rights in *Baldwin, supra,* it is self-evident that the Crow Resolution No. 74-05 does not pass constitutional muster. The Tribe and the United States made absolutely no attempt to support the total proscription of non-Indan hunting and fishing on any rational basis. There also was no attempt by the Tribe to show that "equal protection" under its constitution did not track Anglo Saxon standards.[216] Nor did it attempt to prove that its tribal, cultural or ethnic survival would suffer from full-scale enforcement of the equal protection guaranty afforded by Section 1302(8).[217]

[216] Cf. *Howlett* v. *Salish & Kootenai Tribes,* 529 F.2d 233 (9th Cir., 1976).

[217] Cf. *Martinez* v. *Santa Clara Pueblo,* 540 F.2d 1039, rev'd on other grounds ____U.S.____, 56 L.Ed.2d 106 (1978). The question of sovereign immunity and federal jurisdiction is not an issue in this case because both the Tribe and the United States seek to have this court declare that the Tribe's exercise of political jurisdiction is proper. See also *Trans-Canada Enterprises, Ltd.* v. *Muckleshoot Indian Tribe,* Civil No. C-77-882-M (W.D.Wash., 1978).

If the Indian Civil Rights Act is applicable to non-Indians, then it is obvious that Resolution No. 74-05 deprives non-Indians of due process and equal protection. Of course, if non-Indians do not come within the ambit of I.C.R.A. protection, then it is most important that this court manifest "great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."[218]

X.

THE TRIBE DOES NOT HAVE POLICE POWER JURISDICTION TO ENFORCE RESOLUTION 74-05 AGAINST NON-INDIANS ON NON-INDIAN LAND WITHIN THE RESERVATION

Regulation of fishing and hunting is peculiarly within the police power of a state. *Baldwin* v. *Montana Fish & Game Commission*, ____U.S.____, 56 L.Ed.2d 354, 370 (1978). The term "police power" is but a convenient summarization of the power inherent in a sovereignty[219] to perform adequately all the requisite functions of a civilized government.[220] It has been said that the police power has been left to the states.[221] This points up the fact that although the United States Constitution delimits the police power,

[218] *Oliphant, supra*, 55 L.Ed.2d at 222.

[219] *Barbier* v. *Connolly*, 113 U.S. 27 (1885); *Lake Shore E. M.S. Ry. Co.* v. *Smith*, 173 U.S. 285, 294 (1899); *Nebbia* v. *New York*, 291 U.S. 502, 523-524 (1934).

[220] *The Mayor of the City of New York* v. *Milno*, 11 Pet. 102 (1837).

[221] *Keller* v. *United States*, 213 U.S. 138 (1909); *Hammer* v. *Dagenhort*, 247 U.S. 251 (1918).

none of its provisions created it, nor were any constitutional provisions specifically intended or designed to interfere with or to cripple the police power of the various states.[222]

In the United States, there are only two sovereigns.[223] Therefore, in the face of the fact that tribal jurisdiction over non-members was both explicitly and implicitly divested,[224] the attempted exercise of police power by the Tribe through enactment of Resolution No. 74-05 and other ordinances is anachronistic and invalid.

XI.

THE STATE OF MONTANA HAS AUTHORITY TO REGULATE NON-INDIAN ACTIVITY WITHIN THE RESERVATION

Although the United States and the Tribe argue that the lower court did not have jurisdiction to decide the extent of Montana's jurisdiction over non-Indian fishing and hunting activities within the reservation, it is obvious that issue was not only subsumed within the United States' contentions,[225] but also is the obverse question presented by the United States' and the Tribe's assertion of sole

[222] *The Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518 (1819); *Butchers' Union Co.* v. *Crescent City Co.*, 111 ELSL 746 (1884); *Holden* v. *Hardy*, 169 U.S. 336 (1898).

[223] *Oliphant, supra; United States* v. *Kagama, supra.*

[224] *United States* v. *Wheeler, supra.*

[225] See p. 3 of this brief.

authority to regulate.[226] It is obvious that the states' right to regulate is an issue "raised in the context of a live controversy between parties with adverse interests."[227]

Both this court and the Supreme Court have held that a state has legitimate interests to protect when it reguates non-Indian activities within a reservation.[228] Those interests include regulating non-Indian hunting and fishing activities within an Indian reservation. The lower court's decision on the states' authority to regulate should be affirmed.

In *Draper* v. *United States,* supra, footnote 171, the Supreme Court articulated the principles upon which state jurisdiction attaches to non-Indan activities within the Crow Reservation. *Oliphant, supra,* fully extends the reasoning of *Draper* by eliminating any vestiges of Indian criminal jurisdiction over non-Indians. The United States has partially bridged the jurisdictional hiatus of regulating non-Indian hunting and fishing activity on Indian lands. However, that jurisdiction is only partial. Therefore, the State must complete the regulatory process. This dichotomy of jurisdiction over non-Indians has worked well in the past, and there is no reason to believe it will not continue to operate

[226] The United States' complaint and contentions contained in the pretrial order, insofar as state regulation is concerned, clearly satisfy the "case or controversy" test established in *Aetna Life Ins. Co. of Hartford* v. *Haworth,* 300 U.S. 227 (1937); and *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123 (1951), Justice Frankfunter concurring.

[227] *Moore's Federal Practice,* 2nd Edition, Section 57.11, pp. 57-98.

[228] *United States* v. *Sanford,* 547 F.2d 1085, 1089 (1976) *Moe* v. *Confederated Salish & Kootenai Tribes, supra;* cf. *Oliphant, supra,* and *Puyallup III, supra.* See also *Draper* v. *United States,* ____U.S.____. 17 S.Ct. 107 (1896).

smoothly as long as the Tribe recognizes its jurisdictional limitations.

Tribal jurisdiction can impose no sanctions on non-Indians; therefore, the State must, just as it has in the past, fully regulate a non-Indian's hunting and fishing activities on the reservation.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decision of the district court should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of December, 1978.

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CERTIFICATE OF SERVICE BY MAILING

I, Urban L. Roth, one of the attorneys for the Ap-

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OCTOBER TERM, 1979

THE STATE OF MONTANA, ET AL.,
Petitioners

v.

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE CROW TRIBE IN OPPOSITION

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The Respondent, Crow Tribe of Indians, Montana, adopts the United States' preliminary paragraphs.

TREATIES AND STATUTES INVOLVED

The Crow Tribe adds one additional statute: Organic Act of the Territory of Montana, Act of May 26, 1864, 13 Stat. 85, 86, Section 1.

> ". . . Provided, further, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in

said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Montana, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed."

STATEMENT

The Crow Tribe accepts the United States's Statement, with these additional comments.

The United States initiated this civil action in recognition of its trust duty to protect valuable treaty rights of the Crow Tribe to hunt and fish. In order to protect those rights the Crow Tribal Council enacted Resolution 74-05 on October 13, 1973 (Pet. App. 119-120). Previously the Crow Tribe had issued licenses in a limited fashion to non-members to fish, and take small game and birds (Pet. App. 119). The main reason for closing hunting and fishing to non-Indians was that the game and fish upon which a great number of Crow people depend for subsistence was facing a shortage (Pet. App. 119).[1]

---

[1] The reasons for this closure are fully outlined by the Superintendent, Bureau of Indian Affairs, Crow Indian Agency, in his Memorandum to the Area Director, dated November 14, 1973. (Crow Tribe Exh. 71qq). The reasons include, in addition to the growing shortage of the fish and game, "the influx of

The Crow Tribe in modern times has resisted the forces of assimilation. To a great extent the Tribe's language, customs and culture are preserved. The Big Horn River, a navigable stream which flows from south to north, bisects the Reservation and has had a religious significance to the Crows.[2] Historically the Big Horn River was part of the Tribe's "commissary". Besides fish to supplement their diet, the bed of the river provided "sea shells" which was a medical cure.[3] The rounded rocks from the bed were central to providing heat for the sweat lodges for body purification.[4] The bed provided wood for fuel. The beaver were abundant on the beds and banks.[5]

The court below outlined attempts by the Tribe to control hunting and fishing on the Reservation during the transitional period of the early 1900's (Pet. App. 14, fn. 11A). Since those times the Tribal Council has ac-

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sportsmen, meat hunters and poachers;" the general public taking advantage of the Tribe's inability to control the situation; action by the State of Montana and the U.S. National Park Service indicating that they wished to develop the Reservation for hunting and fishing without regard to tribal wishes; the "press of public opinion to open the entire reservation to hunting and fishing;" the fact that the Tribe was spending much more than its licensing revenues to police the reservation, and such policing was woefully inadequate; the fact the State's policing was only "token to say the least and the state does not even give the appearance of recognizing that there is a problem." The Superintendent concluded that

> "This office is convinced that the Crows concerns are well founded and that under existing circumstances their action is timely and fully justified."

The Superintendent indicated that after full closure had been effected, the Tribe might consider reopening the reservation during certain seasons.

[2] Big Metal for the Crows, Henry Old Coyote, Crow Exh. 75.

[3] Testimony, Henry Old Coyote, Tr. 184.

[4] *Id.*

[5] Sits-in-the-Middle-of-the-Land, Crow Exh. 74, p. 495.

tively sought to control access to the fish and game on the reservation.[6] Basically the Crows have always strenuously resisted access to their big game animals, principally deer, elk and buffalo, while periodically allowing access to small game and fishing.[7]

It is against this backdrop that Resolution 74-05 seems consistent with prior tribal actions. Resolution 74-05 is a remedy in which the Tribe has sought to protect its interests. This civil action was brought by the United States to preserve those interests.

ARGUMENT

1. Neither the Treaty of 1851 nor the Treaty of 1868 Evidenced Any Intent to Remove the Beds and Banks of the Big Horn River from the Land Owned by the Crow Tribe.

At the outset, we point out that the holding by the court below does not seem to present a certworthy issue. The court established no new law, but merely followed the procedures established by this Court in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970), which held that the ownership of the streambed of a navigable river within an Indian Reservation depends on the facts—what the treaties say, what the United States intended, and what the Indians understood.

Following the factual analysis dictated by that approach, the court below could not have ruled other than it did. When the white man first met the Crow Indians, the Crows owned all the land through which the Big Horn River flows, from its headwaters to where it empties into the Yellowstone. In the 1851 treaty, 11 Stat.

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[6] During the last thirty years the Crow Tribal Council enacted numerous tribal resolutions concerning fish and game, Crow Exh. 70a-71aaa.

[7] Testimony, Joe Medicine Crow, Tr. 157; Pet. App. 19.

749, the United States solemnly recognized in very simple terms that this territory belonged to the Crows.[8] The treaty was a *recognition* of their continuing ownership, not a grant of any land to them.[9] If it was a grant of anything, it was a grant of a right to be protected in their ownership in the courts of the United States, a right they may not have had previously.[10] Nothing appears that gives any suggestion that the United States intended not to recognize the Tribe's title to the riverbed, or that the Tribe understood that the riverbed was not included in the recognition.

Later, when the United States wanted to acquire some of the Crows' land, it did so by another treaty. 15 Stat. 649 (1868). This time the Yellowstone River formed part of the boundary between what the Tribe was ceding and what it was reserving, and the calls ran the cession line down the middle of the Yellowstone.[11] That is, the Tribe ceded only the far half of the Yellowstone bed, keeping the near half. Again, there is no suggestion that the Tribe was ceding any riverbeds except of course the far half of the Yellowstone bed.

We think it is also significant that when Montana became a Territory in 1864, the Territorial Act declared that any Indian treaty lands were to "constitute no part of the Territory of Montana, until said tribe shall signify their assent . . . to be included within said territory . . ."

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[8] Pet. App. 85; *Crow Nation* v. *United States*, 81 Ct. Cl. 238, 272 (1935).

[9] See *United States* v. *Winans*, 198 U.S. 371, 381 (1905).

[10] See *Tee-Hit-Ton Indians* v. *United States*, 128 Ct. Cl. 82 (1954); but see *United States ex rel. Hualapai Indians* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941).

[11] Pursuant to the Treaty of 1868, the northern boundary of the Crow Reservation was "thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone . . . ." Article 2 (Pet. App. 89).

Full quotation above, p. 2. And when Montana became a state in 1889, it was required to disclaim all title "to all lands lying within [the state] owned or held by any Indian or Indian tribes . . . ." Pet. 5.

In the face of all this, for Montana to argue that when it became a state in 1889 it acquired the bed of the Big Horn River is ludicrous. If the State of Montana's argument is correct, then the Crows did not even own the near half of the Yellowstone riverbed. Yet during the course of these proceedings the State of Montana has never maintained that the mid-channel of the Yellowstone River was not the northern boundary of the Crow Reservation, or that the point from the "mid-channel of the Yellowstone" to its southern bank was never reserved by the Crow Tribe according to the Treaty of 1868 (Pet. App. 10-17).[12]

Although the Big Horn River was not expressly mentioned in the Treaty of 1868 (because it was wholly within the "metes and bounds" description of the reservation), *Choctaw Nation* instructs that the "natural inference from those grants is that all the land within their metes and bounds was conveyed, including the banks and bed of rivers." 397 U.S. at 634.

This is an "undivided tract of land" set apart by an explicit exterior metes and bounds description, of which the beds and banks of the Big Horn River seem "clearly encompassed within the grant." *Choctaw Nation*, 397 U.S. at 628. Besides the plain reading of the inference

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[12] Recently, this Court in *Wilson* v. *Omaha Indian Tribe*, —— U.S. ——, 61 L.Ed.2d 153 (1979) reviewed the operative effect of language almost exactly similar to that of Article 2, 1868 Crow Treaty: the "center of the main channel of the Missouri River" according to the Treaty of March 16, 1854, 10 Stat. 1043, with the Omaha Tribe. "The eastern boundary of the reservation was fixed as the center of the main channel of the Missouri River, the thalweg. That land, as modified by a subsequent treaty and statutes, has remained the home of the Omaha Indian Tribe." 61 L.Ed.2d 153 at 161; see also discussion at 168-9.

from the treaty of 1868, the Court below in its *Finch* opinion [13] meticulously outlined the "negotiations and background" of both the Treaty of 1851 and the Treaty of 1868 (Pet. App. 69-75) and concluded:

> "Both the assurances given to the Indians during the negotiation of the treaty of 1868, considered against the background of the treaty of 1851, and the explicit language of the 1868 treaty could have had no other meaning in the minds of the Indians than that the Government recognized that all the lands within the metes and bounds of the reservation were to be theirs." Pet. App. 74.[14]

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[13] An earlier stage of the instant case is *United States* v. *Finch*, 548 F.2d 822 (9th Cir. 1976), *vacated* 433 U.S. 676. Reprinted Pet. App. 56.

[14] This was clearly the understanding of the Crows. On August 11, 1873, only 5 years after the Treaty of 1868, the United States met with the Crows near present day Livingston, Montana, to discuss protecting the Tribe's lands from further cessions requested by the United States. Of critical importance to this negotiation is that Chief Sits-in-the-Middle-of-the-Land, also known as Blackfoot, was also the Crow Tribe's principal spokesman during the 1868 Treaty negotiations and pre-negotiations in 1867. Institute for the Development of Indian Law, Proceedings of the Great Peace Commission of 1867-1868 (1975) at pp. 88-91; and see p. 88: ". . . the Crows used to own all this Country including all the rivers of the West. . . ." He did most of the speaking in 1873. Selections of his words and those of the United States through its chief negotiator, Felix R. Brunot, are most appropriate (from Crow Exh. 74, emphasis added):

> (Brunot) ". . . [1868] treaty says where the Crow land is to be. I think it is a good country. It is along this river about seventy-five miles above the agency, and then goes toward where the sun rises until it *crosses the Big Horn*, and goes half way between it and the mouth of the Rosebud River, about twelve miles this side of Porcupine Creek. This is what the treaty and the maps say. That is the country that belongs to you forever, or until you wish to sell it." (p. 494)
>
> (Blackfoot) ". . . All the other Indian tribes fight the whites; we do not do so. We love the whites, and we want them to leave us a big country. . . . The Great Spirit made these mountains and rivers for us, and all this land. We were told so, and

This issue is not worthy of review. The question is factual, not legal; the legal question has been clearly settled in this Court's decision in *Choctaw Nation*. There is no obvious need here to clarify the law. The specific question itself has been raised and considered carefully not once but twice by the court below.

2. Federal Law Defines the Extent of Federal Patents of Lands Riparian to the Big Horn River Wholly Within the Crow Reservation.

On the State's Motion for Reconsideration below in light of *Wilson* v. *Omaha Tribe of Indians*, —— U.S. ——, 61 L.Ed.2d 153 (1979), the Court of Appeals considered whether the upper limit of the title to the bed and banks of the Big Horn River, which is held in trust by the United States for the Crow Tribe, carries to the "high" or "low" water mark (Pet. App. 24-26). Under

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when we go down the river hunting for food we come back here again. . . ." (p. 495)

(Blackfoot)

"When we set up our lodge-poles, one reaches to the Yellowstone; the other is on White River; another one goes to Wind River; the other lodges on the Bridger Mountains. This is our land, and so we told the commissioners at Fort Laramie. . . ." (p. 496)

On the fifth day, August 15, 1873:

(Blackfoot) "On this side of the river and on the other side is our country. I do not know anything about it, I will tell you about it, for I was raised to mark all our country, the streams and mountains, and I would like to keep it . . ." (p. 506).

Brunot, the negotiator, responding to what Blackfoot wanted to give up, stated:

". . . The reason why I do not think Blackfoot's proposition is good, is this: if the Crows keep the valley and sell the mountains, the whites will want all the time to go through your country; your horses will not be safe. If you want wood it is nearly all in the mountain. *You sell even the water-courses with them*; . . ." (p. 507)

Montana law, the limit would be the low water mark. Under ordinary federal law, the limit would be the high water mark.[15]

It was clear that federal law applied as a general proposition, but the precise question was whether federal law should borrow the state rule in this case. After reviewing this Court's reasoning in *Wilson*, the lower court concluded that the federal rule should apply: that the upper limit carried to the ordinary high water mark; that the state rule should not be borrowed, because use of the federal rule, referring to the words of *Wilson*, "very well may prevent frustration of 'federal policy and functions'," owing to the particular history of the allotments of riparian land on the Crow Reservation (Pet. App. 26).

Presently, a substantial amount of land bordering the Big Horn River is either owned by the Crow Tribe, or by individual tribal members who obtained allotments from tribal land. Those riparian lands today owned by the State or by non-Indian individuals were all originally allotted to Indians pursuant to the 1920 Crow Allotment Act, 41 Stat. 751 (Pet. App. 105).[16]

The 1920 Crow Allotment Act was an "affirmative expression" of sovereignty and self-government which was reaffirmed by Congress.[17] Under it, monies were appro-

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[15] *Confederated Salish & Kootenai Tribes* v. *Namen*, 534 F.2d 1376 (9th Cir. 1976), aff'g 380 F. Supp. 452; *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir. 1942). These cases both arose in Montana. See also *United States* v. *Romaine*, 255 Fed. 253 (9th Cir. 1919) (arose in Washington), and see opinion below, Pet. App. 25.

[16] In light of the comprehensive nature of the 1920 Crow Allotment Act (Pet. App. 105), the General Allotment Act of 1887 (Pet. App. 97) had little application to the Crows.

[17] The Crows generally viewed the 1920 Crow Allotment Act as "an expression of self-government." This expression and understanding was so strong that fourteen years later when Congress

priated "to pay the expenses of the general council, or councils, or business committee, in looking after the affairs of said tribe." Section 18 (Pet. App. 118).

The 1920 Crow Allotment Act was a division of Crow Tribal lands among the tribal members. Non-Indians could, however, acquire land in two fashions from allottees: either purchase of lands from allottees who had obtained fee patents under Section 1 (Pet. App. 106), or sales by the Secretary of Interior of inherited allotted lands, with the consent of the Indian allottee, to soldiers, seamen, or marines, Section 15 (Pet. App. 116). Restrictions were placed on the amount of land any one tribal member could sell. Article 13 (Pet. App. 115-116). The Tribe could not alienate land. In order to protect reservation interests, Section 2 (Pet. App. 106) placed a maximum limit on the acreage any one person or corporation could acquire.

This detailed discussion shows that although non-members could acquire land, that ownership emanated from the original allotment process. The 1920 Crow Allotment Act did one more extremely important thing which is central to the holding of the court below. Although land could go out of "trust" status, and into an alienable "fee" status, even if the land was sold to a non-Indian it could be returned to an Indian trust status under the 1920 Crow Allotment Act. Section 14 (Pet.

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enacted the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, the Crows felt the application of the IRA as unnecessary. Testimony of Joe Medicine Crow, Tr. 119. The IRA as amended also reaffirmed this belief. 25 U.S.C. 478b.

Article 6 of the Treaty of 1868 (Pet. App. 92) recognizes that a large quantum of sovereignty existed in the Tribe. For instance, it was recognized that "the United States may pass" legislation "on all subjects connected with the government of the Indians . . . and the internal police thereof, as may be thought proper." Clearly Congress must take *affirmative steps* in an *express fashion* to diminish the Tribe's sovereignty, and where it has not it would be reserved to the Indians' form of government.

App. 116). Titles to lands within the reservation are in a continuing state of flux, going into and out of Indian trust status.

In the *Wilson* case, this Court was concerned about the fact that private landowners who buy land "adjacent to or across from Indian reservations" expect state law to apply. But this cannot be true of a private landowner (or in this case the State, acting in the same manner as a private landowner) who buys land *inside* the Reservation. Such a landowner here would undoubtedly have expected the federal rule on Indian reservations to apply (note 15 supra), and would not have expected to oust the Tribe's ownership of the land between the low and high water lines.

It is obvious, therefore, that there is a continuing federal interest even in alienated lands on the reservation, and that a uniform federal rule should apply. Under the federal rule, the upland riparian land carries to the ordinary high water mark.

Furthermore, the court below held that "when the assumption regarding the title to the Big Horn is removed [i.e., the assumption that the State owns the bed], however, there is much less reason to expect that state law will fix those limits." Pet. App. 26. The State, therefore, in order to establish that its law applies, must assume that the State owned the bed and banks of the Big Horn River in the first instance, which was "to assume something not then established by law" (Pet. App. 26), and which is now disclosed not to be the law.

Thus, tribal ownership of the lands below the ordinary high water mark was not to be at the "mercy of the future state." *Rochester, supra*, 127 F.2d at 192. There is no conflict with this Court's decision in *Wilson*, and no occasion for this Court to speak again on the matter.

3. There Is No Conflict With *Oliphant* Nor With Section 1165 of Title 18 of the U.S. Code.

The State argues (Pet. 19) that the lower court's decision extending Indian control over non-Indian fee land is in conflict with the *Oliphant* case, 435 U.S. 191, and with 18 U.S.C. § 1165.

The *Oliphant* case merely held that tribes do not have *criminal* jurisdiction over non-Indians.[18] The court below recognized this, and limited the Tribe's enforcement powers to noncriminal remedies, primarily the right to expel those who enter the reservation without proper authority or who violate tribal, state or federal laws; or to refer violators to state or federal officials (Pet. App. 18).[19] There is certainly no conflict with *Oliphant* here.

The State also says (Pet. 20) the lower court "ignored the treaty language which implicitly divested the Tribe of jurisdiction over non-Indians . . . ." The court did no such thing. The treaty language to which the State presumably refers (it does not cite any language on p. 20, but it apparently refers to Art. 1 of the 1868 Treaty, Pet. App. 88) provides that if "bad men among the whites" commit any wrong, the U.S. will punish the offender. This clause merely declares that the U.S. will assert criminal jurisdiction over white wrongdoers on the reservation. It does not affect the Tribe's *civil* jurisdic-

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[18] This Court in *Oliphant* referred only to a tribe's *criminal* power over non-Indians. Virtually every single reference in *Oliphant* to the Tribe's power at issue (out of about 60 such references) is to "*criminal* jurisdiction over non-Indians," or "power to *try and punish non-Indians*" (emphasis added). Such care to limit its holding to *criminal* power shows that the Court did not intend to alter the cases upholding tribal civil jurisdiction over non-Indians, see note 20 below.

[19] Citing *Quechan Tribe* v. *Rowe*, 531 F.2d 408 (9th Cir. 1976), quoted at Pet. App. 18. If the violation of tribal regulations takes place on Indian land, the violator may be in violation of 18 U.S.C. § 1165. This makes a federal offense of going on Indian land without permission for the purpose of hunting or fishing.

tion over whites, and tribes clearly do have *civil* jurisdiction over non-Indians.[20]

Petitioner (Pet. 20-22) argues vigorously that 18 U.S.C. § 1165 does not apply to non-Indian land within the reservation, as if the court below had ruled that it did. The court below was well aware that § 1165 only applies to Indian land.[21]

4. Resolution 74-05, as Modified by the Court of Appeals, Is a Valid Exercise of Tribal Authority.

The State has maintained that it can affirmatively authorize, through its licensing processes, non-members to take part in the Tribe's right to hunt and fish.[22] The United States and Crow Tribe sought to enjoin this significant "state action" which substantially interferes with tribal rights. This Court has long recognized that:

> ". . . absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959).

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[20] *United States* v. *Mazurie*, 419 U.S. 544 (1975) (power to regulate non-Indian liquor activity); *Morris* v. *Hitchcock*, 194 U.S. 384 (1904) (power to tax non-Indians); *Merrion* v. *Jicarilla Apache Tribe*, —— F.2d —— (10th Cir., 2/22/80, en banc 5-2) (power to tax non-Indians; full review of cases given).

[21] See opinion, Pet. App. 7, where the Court rejected the District Court's holding, including No. 4, that the Tribe's rights "are limited to those lands set forth in 18 U.S.C. § 1165," i.e., to Indian land. This limit was also covered in the parties' briefs, see Brief of Appellant Crow Tribe, Oct. 16, 1978, at p. 46 n.32. And see Pet. App. 12, where the court correctly refers to the fact that § 1165 "makes going on Indian land to hunt or fish without permission a criminal offense."

[22] See opinion below, Pet. App. 6; see Pretrial Order June 20, 1978, II Agreed Facts, C.T. 966; and see note 1 above. Another aspect of the case which the Tribe found objectionable was that the State had acquired land on the reservation riparian to the Big Horn River, and was inviting the public to enter the reservation and fish from that land.

In *McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 164 (1973), the Court clarified the proper application of the *Williams* infringement test:

> "The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." 411 U.S. at 179.

The Court of Appeals below correctly held that ". . . the State of Montana cannot require the Crows to admit non-members into the reservation for the purpose of hunting and fishing . . ." Pet. App. 20.

Resolution 74-05 was a remedy which the Crow Tribal Council fashioned to protect the subsistence nature of the Tribe's Treaty right to hunt and fish founded upon the Treaty of 1851, Article 5 (Pet. App. 86), and Treaty of 1868, Article 5 (Pet. App. 90).

The State (Pet. 23-26) argues that the Tribe's regulation of a non-Indian fee owner's hunting and fishing shocks the conscience and takes property without just compensation.

The Tribe adopted Resolution 74-05, banning all hunting and fishing by non-Indians until further notice. The full reasons are listed at note 1 above. One of the reasons was the incredible arrogance of the State in licensing non-Indians who did not even live on the Reservation, to come on the Reservation and hunt and fish, as though the Tribe had no say-so whatever. The Tribe's reaction is understandable. It is also legally correct, (1) because the Tribe's hunting and fishing rights are exclusive, and the Tribe has sole power to license them; (2) because the Tribe has the treaty power to bar anyone without authority from entering the Reservation; and (3) because the Tribe has the power to regulate activities on the Reservation, including non-Indian activity.

The court did not discuss the first power. Thus, while we believe it is a fully supported independent basis for Resolution 74-05,[23] we do not discuss it here, beyond noting that it would seem obvious that the Tribe, as owner of the bed of the Big Horn River, could exclude anyone from fishing on the river.[24]

The second power was referred to by the court below at Pet. App. 10. The court held that the Tribe's power to exclude was modified by the General and Crow Allotments Acts, which indirectly permitted non-Indians to acquire land on the reservation. The court believed that Congress must have intended that those who acquired land on the reservation and lived there could not be excluded from the reservation, nor could the power of exclusion be used to bar them from hunting and fishing on their own land. Pet. App. 13, 15. While the tribe believes that its power to exclude does empower it to

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[23] The treaty right to hunt and fish is a Crow "exclusive" property right, and exists independently of ownership of the land. See *United States* v. *Winans*, 198 U.S. 371 (1905); *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Antoine* v. *Washington*, 420 U.S. 194 (1975); *Washington* v. *Fishing Vessel Ass'n*, —— U.S. —— (1979); *Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir. 1974); *cert. den.*, 419 U.S. 1019; *United States* v. *Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979); and *State* v. *Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. den.*, Feb. 26, 1980.

It is interesting to note that Montana itself has held that Indian hunting and fishing rights are exclusive, and did not pass to non-Indian land purchasers:

> "The exclusive right to hunt and fish [within the Flathead Reservation] . . . is a servitude and easement and an interest in the land . . . No patent issued by the government, either federal or state conveyed this right and interest." *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629, 635 (1954).

[24] In the earlier case (*Finch*, note 13 above), the Ninth Circuit so held. Other cases holding that a non-Indian lawfully on an Indian reservation may not fish there without tribal permission are *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918); *United States* v. *Pollman*, 364 F. Supp. 995 (D. Mont. 1973).

ban hunting and fishing on the reservation, even by resident landowners, it did not cross-petition.

The court held that the Tribe possessed the third power (the power to regulate activities on the reservation) and that it extended to hunting and fishing by non-Indians. Pet. App. 17. However, it held that this power could only be enforced by non-criminal means. Pet. App. 19. It also held that the State had concurrent jurisdiction to regulate non-Indians on the reservation. Pet. App. 20. The net effect was that resident non-Indian landowners have to observe whichever authority is stricter on any given point. Pet. App. 21.

The discussion of the third power might be thought to be dicta, since the Tribe totally banned hunting and fishing by non-Indians, and made no effort to "regulate" it.[25] However, as to resident non-Indian landowners on the reservation who live on their land, the court said the Tribe did not have the power to totally ban hunting and fishing, but did have the power of reasonable regulation.

In none of this is there anything that shocks the conscience or violates the Fifth Amendment. People who take up residence on an Indian reservation should expect to be subject to reasonable tribal regulations. They have been subject to such regulation for many years, see note 20 above. Hunting and fishing activities in which Indian tribes have a particular traditional interest, frequently recognized in treaties and statutes,[26] are a fortiori within the Tribe's power to regulate.

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[25] Previous to Res. 74-05, the Tribe did regulate its hunting and fishing resource by allowing access through a licensing process. Pet. App. 119, see p. 2 above.

[26] As discussed above, both the 1851 and 1868 Crow treaties refer to hunting and fishing rights. 18 U.S.C. § 1165, discussed above, was designed to protect tribal hunting and fishing rights, and see also 18 U.S.C. § 1162(b).

The court below correctly recognized that:

> "The Crow Tribe with respect to its reservation is, of course, more than merely a private owner. The Tribe possesses 'attributes of sovereignty over both their members and their territory . . . .' *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). These 'attributes spring from *"inherent powers of limited sovereignty which [have] never been extinguished."*' 435 U.S. at 322 (quoting F. Cohen, Handbook of Federal Indian Law, 122 (1942) (emphasis in original)." Pet. App. 17.

In holding that the Crow Tribe has the power to regulate hunting and fishing by non-members within the exterior boundaries of the reservation, the Court of Appeals made a careful and commendable effort to fulfill its recognized task in this type of case to "fix the rights and powers of Indians in the latter part of the twentieth century in light of treaties of an earlier century" (Pet. App. 15).

The petition for certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE STATE OF MONTANA, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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THE CROW TRIBE OF INDIANS, MONTANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2) is reported at 604 F.2d 1162. The opinion of the district court (Pet. App. 27) is reported at 457 F. Supp. 599. An earlier opinion of the court of appeals in a related case, *United States* v. *Finch* (Pet. App. 56) is reported at 548 F.2d 822. The opinion of this Court in the *Finch* case is reported at 433 U.S. 676.

JURISDICTION

A modified opinion on petition for rehearing (Pet. App. 2), and an opinion denying rehearing (Pet. App. 24) were entered by the court of appeals on September 20, 1979. The petition for a writ of certiorari was filed on January 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the bed and banks of the Big Horn River within the exterior boundaries of the Crow Indian Reservation are held in trust by the United States for the Crow Tribe of Indians.

2. Whether federal or state law defines the extent of federal patents of lands riparian to the Big Horn River wholly within the Reservation.

3. Whether Crow Tribal Ordinance 74-05, as modified by the court of appeals, is a valid exercise of tribal authority.

TREATIES AND STATUTES INVOLVED

The principal statutes and treaties involved are set forth in the appendix to the petition (Pet. App. 83-120). Other relevant statutes are set out in the petition (Pet. 4-6).

STATEMENT

1. The present Crow Reservation in Montana is a part of the large area, encompassing some 38 million acres, recognized as belonging to the Crow Tribe

by the First Treaty of Fort Laramie in 1851. Pet. App. 83-87.[1] Although distinct territories were assigned to the other seven signatory tribes, the treaty expressly preserved, for each of the tribes, the "privilege of hunting [and] fishing" within the entire area confirmed as Indian country. Pet. App. 86. In 1868, by the Second Treaty of Fort Laramie (Pet. App. 88-95), the Crows ceded some 30 million acres to the United States, and the balance of their former territory was "set apart for [their] absolute and undisturbed use and occupation," the United States "solemnly agree[ing] that no persons [other than authorized government agents] shall ever be permitted to pass over, settle upon, or reside in the territory" described. Article 2, Pet. App. 89-90. The reservation was to be the "permanent home" of the Crow, but they retained "the right to hunt on unoccupied lands of the United States so long as game may be found thereon." Article 4, Pet. App. 90. Finally, the treaty stipulated that no part of the reserved lands could validly be ceded unless at least a majority of the adult members agreed. Article 11, Pet. App. 95.

Article 2 of the 1868 Treaty (Pet. App. 89) describes the boundary of the Crow Reservation as follows:

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[1] The several boundaries of the Crow Reservation from 1851 to the present are shown on the sketch map reproduced as an appendix to this brief. The map summarizes the several maps appended to the opinion of the district court in *United States* v. *Finch*, 395 F. Supp. 205, 215-220 (D. Mont. 1975).

> * * * commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning * * *

This description, on its face, includes one-half of the Yellowstone River, a navigable stream, as part of the Reservation. The Big Horn River, a navigable tributary of the Yellowstone, is entirely included up to the Montana-Wyoming boundary.[2]

Subsequently, substantial additional territory was ceded to the United States, ultimately reducing the reservation to 2,282,764 acres. See Pet. 8 n.6, 14-15 n.24; Pet. App. 5. In two major transactions, one shortly before and one shortly after Montana became a State in 1889, the lands ceded, where bounded by the Yellowstone River, were described as reaching to "the mid-channel" of that river. Act of April 11, 1882, ch. 74, 22 Stat. 42; Act of March 3, 1891, ch. 543, 26 Stat. 989, 1039. A major stretch of the Big

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[2] We focus on the Treaty of 1868 because, at the latest, that is the Act by which the United States granted or confirmed the bed and banks of the Big Horn River to the Crow Tribe. But it is not irrelevant that the Crow territory, as defined by the Treaty of 1851, surrounded the entire course of the Big Horn River from its source to its mouth, and also most of the Yellowstone River. See Appendix, *infra*.

Horn River remains surrounded by the Crow lands. See Appendix, *infra*.

In due course, the reservation was in large part allotted to individual members of the Tribe. Some of the allotments were ultimately purchased by the State of Montana and the State now holds several riparian tracts along the Big Horn River. See Pet. App. 5, 77. Substantial acreage is today held in fee by non-Indians. Pet. App. 5.

In 1973 the Crow Tribal Council adopted an ordinance which purports to prohibit hunting and fishing throughout the reservation except by members of the Tribe. Pet. App. 5-6 and n.4, 119-120. At the same time, the State claims authority to license and regulate hunting and fishing within the Reservation by non-members. Pet. App. 5-6.

2. The United States filed this action on October 9, 1975, seeking a judgment declaring that the United States holds title to the bed and banks of the Big Horn River within the exterior boundaries of the Crow Reservation in trust for the Crow Tribe and that the Tribe enjoys exclusive authority to regulate hunting and fishing within the Reservation. The case parallelled *United States* v. *Finch*, a criminal prosecution under 18 U.S.C. 1165 then pending in the same district court, to ensure that the like issues there presented would be decided if the prosecution failed on other grounds. As it happens, the district court in *Finch*, 395 F. Supp. 205 (D. Mont. 1975), declared that the bed of the Big Horn River belonged to the

State of Montana and that Finch, a non-Indian, therefore could not be convicted of trespassing upon Indian-owned land by fishing on the Big Horn River within the Reservation. The court of appeals reversed, 548 F.2d 822 (9th Cir. 1977) (Pet. App. 52-86), concluding that the bed and banks of the Big Horn River within the Crow Reservation were trust lands held by the United States for the Crow Tribe. But this Court summarily reversed on double jeopardy grounds, 433 U.S. 676 (1977), without referring to the other issues. The present case was then pursued.

On August 1, 1978, the district court, adhering to its *Finch* decision, held that: (1) title to the riverbed is in the State of Montana; (2) the State has exclusive jurisdiction to regulate non-Indian hunting and fishing on fee patented lands on the Reservation; (3) the State and the United States, pursuant to 18 U.S.C. 1165, have concurrent jurisdiction to regulate non-Indian hunting and fishing on trust lands within the Reservation; (4) the Crow Tribe's exclusive right to hunt and fish on its Reservation is restricted to trust lands; and (5) the Tribe's regulatory authority on the Reservation is limited to the right to grant or withhold permission to non-Indians to trespass upon trust lands for the purpose of hunting and fishing (Pet. App. 54-55).

On appeal, the Ninth Circuit reversed, and again ruled that the bed and banks of the Big Horn River are held in trust by the United States for the Crow

Tribe; that the Tribe can prohibit non-resident non-Indian hunting and fishing on all lands on the Reservation; but that the Tribe cannot prohibit non-Indian residents from hunting and fishing on their own lands within the Reservation, although they can be made subject to non-discriminatory tribal regulation. The court went on to hold that Montana may regulate non-Indian hunting and fishing on the Reservation so long as State regulation does not interfere with the tribal regulatory program. In effect, the non-Indian is bound to observe the stricter of the two sets of regulations. Finally, the court held that the State cannot regulate directly or indirectly hunting and fishing by members of the Tribe on the Reservation.

The United States filed a motion for reconsideration on three issues: the tribal power to regulate non-member hunting and fishing; the availability of civil forfeiture as a tribal enforcement mechanism; and the existence vel non of concurrent state jurisdiction over non-member hunting and fishing. The petitioners also sought reconsideration, asserting that *Wilson* v. *Omaha Tribe*, No. 78-160 (June 20, 1979), required the application of state law to define the extent of federal patents of land riparian to the Big Horn River. The amended opinion of the court of appeals (Pet. App. 2) denied both petitions for rehearing. See, also, Pet. App. 24.

ARGUMENT

Although we do not agree with all aspects of its decision, we believe the court of appeals correctly resolved the only issues tendered to this Court by the petition for certiorari. For the most part, moreover, the questions presented here turn on the special facts of the case. There is no conflict of decisions. Accordingly, the challenged rulings do not call for review by this Court.

1. Petitioners first (Pet. 10-17) assail the holding of the court of appeals that the bed of the Big Horn River within the Crow Reservation belongs to the Tribe, rather than the State. This is said to violate the Equal Footing Doctrine, which, it is suggested, absolutely forbade any alienation of the soil beneath navigable rivers by the United States before the future State was admitted to the Union. But that proposition, originating in *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212, 220-230 (1845), was repudiated within five years, *Goodtitle* v *Kibbe*, 50 U.S. (9 How.) 470, 478 (1850), and was definitively rejected before the end of the century, *Shively* v. *Bowlby*, 152 U.S. 1, 47-48, 58 (1894). Consistently since then, the Court has conceded the constitutional power of the United States to grant away, before statehood, the shores and beds of navigable waters. *E.g.*, *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 83-85 (1922); *United States* v. *Holt State Bank*, 270 U.S. 49, 54-55 (1926); *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 633, 639 (Doug-

las, J., concurring), 646-647 (White, J., dissenting) (1970). In light of this firmly established jurisprudence, we cannot read the somewhat ambiguous passages from the opinion in *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977), quoted by petitioners (Pet. 15-16), as intended casually to change so fundamental a rule.

The question actually presented in this case is a much more modest one, which turns on the particular history of the Crow Reservation: whether, in this instance, the United States *intended* to convey, or confirm, to the Tribe the bed of the Big Horn River, or, rather, to reserve it for the benefit of a future State. That narrow issue is of local importance only and, in the absence of any conflict between federal and State courts, does not obviously commend itself for review here. At all events, we believe the court of appeals correctly resolved the question in *United States* v. *Finch*, 548 F.2d 822 (9th Cir. 1976) (Pet. App. 56, 64-76), vacated on other grounds, 433 U.S. 676 (1977), and rightly adhered to that decision in this case (Pet. App. 9).

The controlling precedent is *Choctaw Nation* v. *Oklahoma*, *supra*, in which this Court upheld the claim of Indian tribes that the grant to them of certain lands in Oklahoma should be construed to include the bed of the Arkansas River. To be sure, there the relevant treaty promised—presumably in good faith —that the lands set aside for the Indians would never be embraced within a State. 397 U.S. at 625.

But, in other respects, the present case is a stronger one for the Tribe's claim. Here, the river is not a boundary between discrete Indian territories, but runs through the center of a single "permanent" reservation, from which all non-members are expressly excluded, except specially authorized government officials. Indeed, originally, the river, for its entire course, was surrounded by the Crow lands. In such circumstances, it would make no sense to carve out the Big Horn River from the grant. To do so, moreover, would be wholly inconsistent with the repeated recognition, in the Treaty of 1868 and the Acts of 1882 and 1891, that the Reservation included half the larger Yellowstone River on the north.

There is a further consideration. Here—unlike the *Choctaw* case—the United States was recognizing a reserved portion of the aboriginal Crow lands [3] as belonging to that Tribe and confirming its exclusive rights there. Thus, there was no occasion to "grant" the river bed within that territory to the tribe: it would be retained by the Crow unless ceded by them. Cf. *United States* v. *Winans*, 198 U.S. 371, 381 (1905); *Washington* v. *Fishing Vessel Assn'n*, No. 77-983 (July 2, 1979), slip op. 14.

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[3] The district court noted that the Crow had not always occupied the area in question (Pet. App. 32). But, for our purposes, it is enough that the territory embraced by the present reservation (and much more) was occupied as their exclusive domain well before the Treaty of 1868. The Crow claim to these lands was recognized by the neighboring tribes and by the United States at least as early as 1851. See Pet. App. 4, 10, 65, 70-71.

In sum, the present holding is a faithful application of the principles announced in *Choctaw Nation* and does not call for review in this Court.

2. Petitioners next (Pet. 17-19) argue that the court below violated the rule of *Wilson* v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979), in fixing the limit of riparian ownership along the Big Horn River in accordance with federal law, at high-water mark, ignoring the Montana law which normally construes riparian grants as reaching to low-water mark. In our view, the court was plainly correct in rejecting this claimed conflict. Pet. App. 24-26.

The present question arises in a very unusual context. Whereas, normally, the State as owner of the bed of a navigable river would have every interest in pressing that claim to high-water mark, as against private riparian owners, *e.g.*, *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313 (1973), here the State itself is in some stretches the upland owner, asserting extensive riparian rights against the owner of the riverbed. For that reason, petitioners focus on the rules governing riparian property. But the matter is more correctly analyzed, it seems to us, by starting with the definition of the riverbed which, in the more usual situation, inures to the State.

This Court has recently emphasized that State ownership of navigable water bottoms derives directly from the Constitution. *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 374. It must follow that the extent of that "grant" is governed by

a uniform rule: the Equal Footing Doctrine requires as much. *Id.* at 376. And that rule has always been understood to encompass "the *shores* of navigable waters," as well as "the soils under them." *Pollard's Lessee* v. *Hagan*, *supra*, 44 U.S. (3 How.) at 230. Thus, at statehood, the new State becomes owner of navigable riverbeds to high-water mark—absent an exceptional previous alienation by the United States —and the United States, as upland owner, enjoys no property rights beyond that point and can convey none.

It is difficult to appreciate why any State should wish to challenge such a favorable rule, save in the atypical situation presented here. Nor is it obvious why the usual rule ought not govern this case. The State's title as riparian owner derives by purchase from a federal patentee, originally a Crow allottee. Although, as owner of both the riverbed and the upland, the United States in this instance was free to convey the shore, there is no reason to construe the present patent as granting more than would be included in every other riparian grant from the national government. No doubt, when it owns the riverbed, the State may grant away a portion of it to the riparian proprietor—whether by special deed or general law—and thereby add to the federal patent. But there can be no justification for such unilateral action when the riverbed, to high-water mark, is held by the United States in trust for an Indian Tribe. Nothing in *Wilson*—or in *Corvallis Sand & Gravel*

Co.—remotely suggests that a State may thus alter the boundary of the federal domain.

3. Finally, there is no substance to the charge (Pet. 19-28) that the court below violated settled principles by recognizing tribal authority over hunting and fishing within the Reservation by non-members. Certainly, there is no conflict with *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1979). The cited decision holds only that Indian tribes cannot assert *criminal* jurisdiction over non-Indians. But neither that case nor any other forecloses Indian tribes from fashioning civil regulations governing activities within their Reservation, binding on non-members, whether outsiders or those who own plots there. On the contrary, "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations," even when it reaches non-Indians. *Williams* v. *Lee*, 358 U.S. 217, 223 (1959), quoted and applied in *United States* v. *Mazurie*, 419 U.S. 544, 558 (1975). Whatever the limits of the principle, we believe it plainly embraces tribal regulation of hunting and fishing within the Reservation boundaries, so long as the tribe itself does not seek to impose criminal sanctions on non-members. See Pet. App. 19-20.

Strong arguments could be advanced in support of the Crow Tribe's attempt to exclude all non-members, including resident owners, from hunting and fishing. But that question is not presented to this Court, the tribal regulation having been invalidated insofar as

it proscribes hunting and fishing on their own lands by non-member residents of the reservation (Pet. App. 15) and no cross-petition for certiorari having been filed. The court below condoned only exclusion of outsiders (Pet. App. 15) and regulation of hunting and fishing by non-member residents to the extent only that it is "reasonable, non-discriminatory, and consistent with sound principles of conservation" (Pet. App. 23). What is more, the decision concedes the concurrent applicability of State licensing and any more stringent regulation of hunting and fishing by non-members (Pet. App. 20-21). Such a modest accommodation of interests hardly calls for this Court's intervention.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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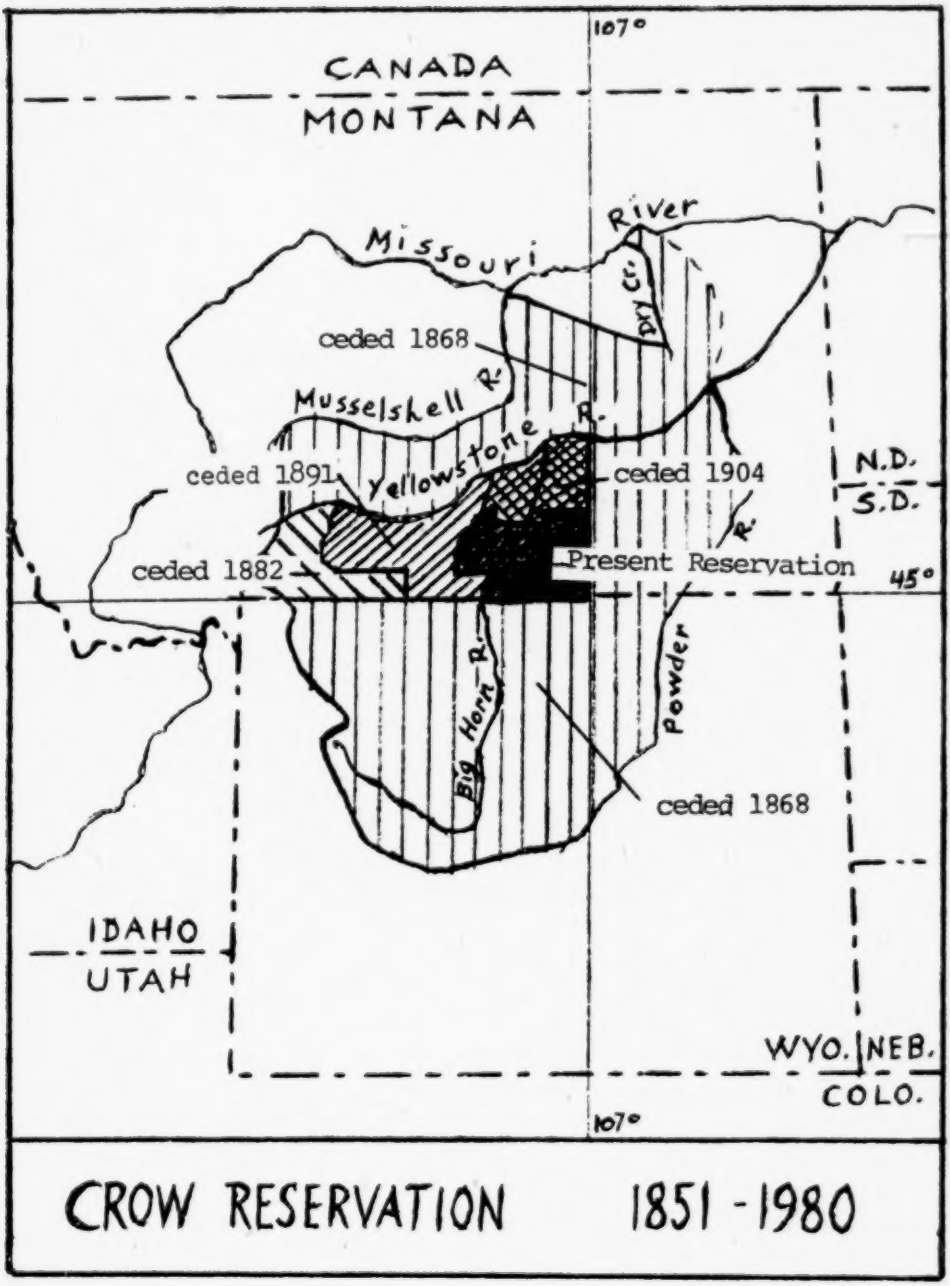

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OCTOBER TERM, 1980

No. 79 1128

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Respondents

V.

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Petitioners.

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PETITIONER'S REPLY BRIEF

I.
THE LOWER COURT'S HOLDING ON RIVER OWNERSHIP CONFLICTS WITH ESTABLISHED LAW AND IS OF VAST IMPORTANCE TO NUMEROUS STATES

Respondent, United States, opposes review because the "questions presented here turn on the special facts of the case" and present no conflict in decisions. (Resp. 8) Thus, Respondent contends that a purely parochial question of "modest" dimensions is raised. (Resp.9) These arguments do not withstand close scrutiny.

The argument that Reservation boundaries refer to the mid-channel of the Yellowstone River or that the Big Horn was entirely and still partially remains within the boundaries of the Crow Reservation does not render the question presented here a purely local one. Numerous other treaties created reservations using similar descriptions encompassing navigable waters.[1] Mud Lake was entirely within the boundaries of the Red Lake Reservation studied in *United States v. Holt State Bank*, 270 U.S. 49, 52 (1926), and portions of the Puyallup River bisect the Puyallup Reservation. *Puyallup Tribe, Inc. v. Washington Game Department*, 433 U.S. 165, 174, n. 12 (1977).

[1] See e.g., Treaty with the Flathead, 1855, II Kapp. (most recent printing) 722; Treaty Umpqua and Kalapuya, 1854, II Kapp. 657, 658; Treaty with the Wallawalla, et al., 1855, II Kapp. 694; Treaty with the Nez Perces, 1855, II Kapp. 702, 703.

Respondent also relies upon "boilerplate" treaty provisions which are in a host of other Indian treaties. (Pet. 13, n. 22; Amici 4, n. 5) The Chippewa were guaranteed "permanent homes," but this fact was insufficent to overcome the *constitutional presumption* that title to Mud Lake passed to the State. (Treaty with the Chippewas, II Kapp., 686, Art. 2; *Holt, supra,* 55) The Puyallup and other tribes were extended guarantees similar to the Crow (Amici 4), but this Court implicitly disparaged their importance in *Puyallup Tribe, Inc. v. Washington State Game Department,* 435 U.S. 165, 174, n. 12 (1977).

Respondent also argues that the lower court's ruling is consistent with *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970), and compares the Crow Reservation, in which the Tribe had expressly relinquished their sovereignty to the United States in accepting a "dependent" status (Pet.App.E, Arts. 1, 6, 7, 9, 10, pp. 88, *et seq.*), to that of the Choctaw who, for most purposes, were an "independent country" (*Atlantic and Pacific Railroad Co. v. Mingus,* 165 U.S. 413, 435-436 (1977)). Obviously, the comparison is inapt.

Sovereignty and ownership of navigable waters are inextricably linked (*United States v. Oregon,* 295 U.S. 1, 14 (1935); cf. *Shively v. Bowlby,* 152 U.S. 1 (1894)), and there are but two sovereigns—the United States and the individual states. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 211 (1978). The Crow Tribe does not possess those traits of sovereignty upon which ownership of navigable

waters is dependent. Moreover, this Court early recognized that the semi-independent status of the Indian was "temporary." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 593 (1832) (Justice McLean concurring). Indeed, this Court, interpreting the Crow Treaty, said that it contemplated "ultimate complete ownership" of reservation land by "individual Indians." *United States v. Powers*, 305 U.S. 527,533 (1938).

Acquisition of the Louisiana Territory, within which the reservation lies, was conditioned upon its inhabitants being "incorporated in the Union *** as soon as possible,"[2] and Congress quickly acted to guarantee to all of its citizens the full navigation of waters within that territory.[3] "Use and occupation" of the land was guaranteed under the Crow Treaty (Pet. App. E, 89, Art. 2), but the fee, unlike *Choctaw*, was reserved—and like *Holt* passed to the state upon admission into the Union on an "equal footing" with her sister states. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

The vast importance of river status in this case is focused upon in the amici brief filed on behalf of Washington and Idaho in which seven other states join. The decision reached by the lower court, if not corrected, will spawn a plethora of identical lawsuits which will threaten long-standing land titles, state projects and state administrative practices

[2] Treaty with France, April 30, 1803, proclaimed October 21, 1803, 8 Stat. 200; compare *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1884).

[3] 33 U.S.C. §11 (Act of March 3, 1811).

throughout the Eighth, Ninth and Tenth Circuits.[4] The fact that many of the treaties establishing reservations in these circuits use language similar or identical to the Crow Treaty makes the question presented here one worthy of review.

II.
THE FEDERAL CHOICE-OF-LAW RULE EXTENDS RIPARIAN LAND OWNERSHIP TO LOW WATER

Respondent misconstrues this Court's holding in *Wilson v. Omaha Indian Tribe,* —U.S.—, 61 L.Ed 2d 153 (1979), in arguing that the state is attempting to alter the boundary of the federal domain. (Resp. 12-13) In *Wilson,* this Court articulated the Federal Choice-of-Law Rule which applies state law—as the federal rule—in measuring the extent of the federal grant. *Wilson, supra,* 61 L.Ed.2d 169-172.

If indeed the United States still owns the fee to the riverbed in trust for the Tribe, then following Respondent's argument, it is free to alienate all or any part of that bed. (Resp. 8) If the state owns the riverbed, this question is moot. If the state does not own the riverbed, then it stands in the shoes of any other federal patentee expecting to receive all those "incidents of *** ownership" which are securely attached to the patent by federal law. *Wilson, supra,* 61 L.Ed.2d 169, n. 18. In this instance, those rights,

[4] There are 153 Indian reservations within the Ninth Circuit and 90 such reservations within the Eighth and Tenth containing millions of acres of fee lands. *Federal and State Indian Reservations and Indian Trust Areas,* U.S. Dept. of Commerce, G.P.O. 1974.

by virtue of the Federal Choice-of-Law Rule laid down in *Wilson*, are measured by state law and extend title to low water.

III.
ABSENT EXPRESS CONGRESSIONAL SANCTION, THE CROW TRIBAL RESOLUTION IS AN INVALID ASSUMPTION OF AUTHORITY

Respondent, arguing from this Court's holding in *Williams v. Lee*, 358 U.S. 217 (1959), and *United States v. Mazurie*, 419 U.S. 544 (1975), contends that the Tribe possesses authority to regulate non-Indian activity on non-Indian land. Neither decision supports this thesis.[5]

No question is presented in this case of state action infringing "on the rights of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee, supra*, at 222; cf. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, n. 9. Petitioners have expressly conceded they have no authority to regulate Indian hunting and fishing within the reservation. Nor is this a case in which regulation of non-Indians within a reservation has been expressly sanctioned by Congress. *United States v. Mazurie, supra*, 554-555; see e.g., 18 U.S.C. §1161. In the face of the limited congressional action addressing hunting and fishing on "Indian" lands (18 U.S.C. §1165)

[5] A similar argument was advanced by the United States in *Oliphant, supra*, pp. 15-16, Brf. United States, but rejected for the same reasons it should be rejected here.

and this Court's recognition of but two sovereigns (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978)), it is difficult to conceive of a source from which the Tribe can draw its authority to control non-Indian activity on non-Indian land. The quasi sovereign status of the Tribe is, of course, the source which nourishes its authority to govern its tribal members. *United States v. Wheeler*, 435 U.S. 313 (1978). The Treaty did not materially diminish that authority. By the same token, it is the dependent status imposed upon the Tribe by the Treaty which is totally inconsistent with Indian authority over non-Indians absent congressional sanction. Cf. *Oliphant, supra*, 206-208, and *United States v. Wheeler, supra*, 435 U.S. 326. The lower court's unprecedented disregard of this principle merits review.[6]

[6] In the circuits, courts have reached totally disparate results post-*Oliphant*. In *Merrion*, et al. v. *Jicarilla Appache Tribe*, et al., No. 78-1154 consolidated on appeal with *Amoco Prod. Co.*, et al. *v. Jicaquilla Appache Tribe*, et al., No. 78-1251 (10th Cir. En Banc, February 22, 1980), the Tenth Circuit, despite *Oliphant*, invested an Indian Tribe with tax authority over non-Indians. In *Confederated Salish and Kootenai Tribes* v. *Namen*, CV No. 2343 (D. Mont., September 19, 1979), 6 Indian Law Reporter F-161, 169-175, Judge William Jameson in a memorandum decision, pp. 44-58, citing *Oliphant* and *Wheeler*, held an Indian tribe does not possess civil regulatory power over a non-Indian's use of fee land within a reservation. A similar result was reached in *Trans-Canada Enterprises, Ltd.* v. *Muckleshoot Indian Tribe*, No. CV 77-882-M (W. D. Wash., July 27, 1978), 5 Indian Law Reporter F-153. These conflicting decisions need to be rationalized.

RESPECTFULLY SUBMITTED this 13th day of March, 1980.

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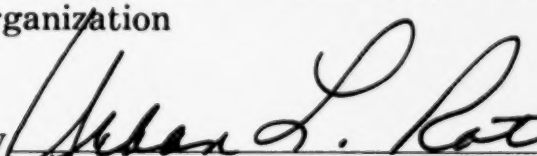
By 

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IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 79-1128

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, et al.,

Petitioners,

v.

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Respondents.

BRIEF OF AMICI CURIAE STATES OF WASHINGTON AND IDAHO IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. (a). Does an Indian treaty, which makes no specific reference to the ownership of the beds of navigable rivers running through an Indian reservation, impliedly deprive a subsequently formed State of the ownership of the river bed to which the State would otherwise be entitled under the equal footing doctrine, as reaffirmed in *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363?

(b). If, under such a treaty, the tribe acquired ownership of the bed of a navigable river, does such tribal ownership continue even after, pursuant to federal law, the lands abutting the river have been sold to non-Indians?

II. May a tribe, in the absence of authorization by either federal statute or treaty, regulate or prohibit hunting and fishing by non-Indians on lands within a reservation after such lands have been sold to non-Indians pursuant to federal law?

STATEMENT OF THE CASE

The facts involved are set forth in the Statement of the Case found in Montana's Petition for Certiorari. pp. 6-10.

It should be emphasized that about 30% of the Crow reservation lands have been sold to non-Indians—including lands abutting the Big Horn River.[1] Thus, along various parts of the river, the United States no longer owns the riparian land, either in trust for the Indians or otherwise.[2]

STATEMENT OF INTEREST OF AMICUS CURIAE

In the State of Washington there are 23 Indian reservations, with most having navigable rivers.

[1]These sales were made pursuant to the General Allotment Act of 1887, 24 Stat. 388, or the Crow Allotment Act of 1920, 41 Stat. 751.

[2]Just such a parcel was involved in *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), vacated 433 U.S. 676 (1977), a companion case to this one. James Junior Finch was arrested for casting his lure into the Big Horn River from the banks of riparian land owned by the State of Montana.

As this Court is already aware from prior cases arising in Washington,[3] much of the land on these reservations has passed into non-Indian ownership, just as has occurred on the Crow Reservation. This is the result of the federal policy embodied in various allotment acts, including the General Allotment Act of 1887. An extreme example of this result is the Puyallup Reservation in Washington, where there are only 22 acres remaining in Indian ownership, none of which are adjacent to the Puyallup River. See, *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 105, *"Puyallup III."*

In Washington, statewide, the non-Indian reservation population is approximately 58,000, while the Indian population is approximately 13,500.[4] This ranges from the Port Madison Reservation with about 3,000 non-Indians and about 50 Indians (see, *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978)) to the Quinault Reservation, which has very few resident non-Indians.

The major Indian reservations in Washington, with two exceptions, were created pursuant to the six "Stevens Treaties," with which this Court is

[3]See *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977) (Puyallup Reservation); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) (Port Madison Reservation); *Washington v. Confederated Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) (Yakima Reservation); *Washington v. Confederated Tribes of the Colville Reservation, et al.*, appeal pending, No. 78-360 (Colville, Lummi, Makah and Yakima Reservations).

[4]We would here emphasize and word "approximately." See Reply Brief for Appellants in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), p. 14, for the sources of these estimates. Exact figures are difficult to obtain, but these estimates are sufficiently reliable to show the pattern arising under the allotment acts.

familiar from the Puyallup cases and *Washington v. Washington State Commercial Passenger Vessel Association*, ... U.S. ....., 99 S. Ct. 3055 (1979).[5] Article II of the Stevens treaties is very similar to Article II of the 1868 treaty with the Crows. The Stevens treaties "reserve[d] for the * * * use and occupation of the said tribes and bands * * *" certain described tracts of land and provided:

> "* * * all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent."

No reference is made in the treaties to the rivers flowing within these tracts. The treaties are thus silent on the question of whether the Indians' right of "exclusive use" extends to the rivers.

The factual similarities between the situation on the Crow reservation and that on Washington's reservations, together with similarities in language between the Crow Treaty of 1868 and the Stevens treaties, underly the great practical importance of this case to the State of Washington.

To put the matter quite simply, if this attack by the United States and the Crow Tribe on Mon-

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[5] Treaty with the Makahs (Treaty of Neah Bay), 12 Stat. 939; Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliott, 12 Stat. 927; Treaty of Point No Point, 12 Stat. 933; Treaty with the Quinaielts (Treaty of Olympia), 12 Stat. 971; Treaty with the Yakimas, 12 Stat. 951.

tana's ownership of the bed of the Big Horn succeeds, attacks on Washington's rivers will surely be forthcoming. If the Crow Tribe has the power to regulate hunting and fishing by non-Indians, on non-Indian reservation land, the Washington tribes will surely claim no less a power over non-Indians.

Our experience with the federal government and the tribes—experience with which this Court is familiar—leaves us little doubt that the rivers and non-Indian citizens of Washington State are high on the list of future targets.

The impact of the lower court's ruling in the State of Idaho would be similar to that in Washington. There are four Indian reservations in Idaho, two of which contain large amounts of land owned by nonmembers of the respective tribes. The Nez Perce Reservation contains approximately 756,000 acres, of which about 669,000 acres or 88.5% is owned by nonmembers of the tribe. The Couer de Alene Reservation contains approximately 345,000 acres of which approximately 275,000 or about 80% is owned by nonmembers of the tribe.

One of the State's most important river fisheries, the Clearwater River, runs across the northern and eastern portion of the Nez Perce Reservation. The boundaries of the Couer de Alene Reservation include several navigable bodies of water, such as the St. Joe River, Couer de Alene Lake (one of the three largest natural lakes in Idaho) plus the smaller

Benewah, Chalcolet and Hidden Lakes. The Blackfoot River forms a portion of the northeastern and northern boundaries of the Fort Hall Indian Reservation, with the Snake River forming the northwestern boundary.

If the decision of the court below is allowed to stand, it is probable that the Nez Perce and Couer de Alene Indians will assert claims to the beds of the navigable waters within their reservations. The possibility also exists that the Shoshone-Bannock Indians on the Fort Hall Reservation will assert claims to the beds of the navigable waters within their reservations, including the Snake and Blackfoot Rivers which delineate the reservation boundaries.

Further, as already noted, almost a million acres of land lying within Idaho's Indian reservations are owned by non-Indians. The rights of non-Indians in Idaho to hunt and fish on these lands are at stake in this case, just as in Washington and Montana.

DISCUSSION

I. OWNERSHIP OF THE RIVER BED.

We first take up the issue of the ownership of the river bed. The best starting point for putting this issue in focus is found in *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165, *"Puyallup III"*; for a central issue in *Puyallup III* was the applicability of the "exclusive use" language of Article II to lands within the reservation and to the Puyallup River itself. As stated by the Court:

> "The Tribe vigorously argues that the majority of its members' netting of steelhead takes place inside its reservation.
>
> "* * *
>
> "Article II of the Treaty of Medicine Creek provided that the Puyallup Reservation was to be 'set apart, and, so far as necessary, surveyed and marked out for their exclusive use' and that no 'white man [was to] be permitted to reside upon the same without permission of the tribe and the superintendent or agent.' It is argued that these words amount to a reservation of a right to fish free of state interference. Such an interpretation clashes with the subsequent history of the reservation and the facts of this case. Pursuant to two Acts of Congress, 27 Stat 633, and c 1816, 33 Stat 565, the Puyallups alienated, in fee simple absolute, all but 22 acres of their 18,000-acre reservation. None of the 22 acres abuts on the Puyallup River.[12] Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive use'." 433 U.S. 173, 174.

In footnote 12, the Court had more to say about the river:

> "Counsel for petitioner [Puyallup Tribe] intimated at oral argument that petitioner might contend in the future that it retained trust status title to the bed of the Puyallup River, Tr of Oral Arg 10. This contention is at odds with the otherwise uncontradicted findings below." [i.e., the findings that all but 22 acres had been alienated]

In short, the "exclusive use" language of Article II of the Stevens Treaties—and presumably the similar language of Article II of the Treaty with

the Crows—cannot be construed to create a legal Cheshire Cat. If the Tribe's trust status title to the riparian lands disappeared, trust status title to the adjoining river bed must have disappeared along with it: No legal "smile" remains.[6]

But this result, which was decreed by this Court in *Puyallup III*, is completely irreconciable with the result in the court below. According to that court, trust title to the bed of the Big Horn River remains in the Crow Tribe *even in those portions of the River where the abutting land has been alienated.* Though Article II of the Treaty with the Crows no longer applies to the abutting lands, it still somehow applies to the river bed. The smile of the Cheshire Cat remains hanging over the Big Horn River, though it ceases to hang over the Puyallup.

We need hardly point out the confusion created by these conflicting results. And if this Court does not dispel that confusion by reviewing this case, we fear that the confusion will become worse compounded by litigation that will surely be forthcoming.

The result in *Puyallup III* could have been reached by another route, not there presented, which is, however, the major issue presented here. The issue, simply put, is this: Does Article II of the Crow

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[6]And accordingly, the State would now have title to the river bed. For now the "exclusive use" language of Article II, being no longer applicable, would not prevent the application of the equal footing doctrine. The title of the navigable river would be in the State, rather than in the riparian owner.

and Stevens treaties apply to navigable rivers so as to deprive the State of title to the river beds as an initial matter?

In contrast with *Puyallup III*, that issue must be addressed here; for some of the riparian lands along the Big Horn River are still held by the United States in trust status for the Crow Tribe.

There is no question that the bed of the Big Horn River is now in some type of trust status, and, indeed, always has been in such a status since the United States first laid claim to the geographical area now encompassed by the State of Montana. The question is: Who is the trustee? And, even more importantly, who are the beneficiaries?

Under the equal footing doctrine, as reaffirmed in *Corvallis Sand and Gravel Co.*, 429 U.S. 363, the United States holds the title to the beds of navigable rivers within a territory, in trust for the future State to be formed from that territory. The State, in turn, acquires title to those beds upon admission to the Union. The title of the State, however, is itself that of a trustee; it is the American counterpart of the King's title to navigable waters in England under the common law. Title is held by the State—and the King—for the benefit of the public generally, for purposes of navigation and the like. After all, that is why the equal footing doctrine applies only to *navigable* rivers, and not to all watercourses generally. See *Shively v. Bowlby*, 152 U.S. 1 (1894).

Did Article II of the treaty with the Crows intend to arrest the operation of the equal footing doctrine, and thereby cut off the right of the public generally to use navigable rivers running through the reservation? Was the exclusive right of use of these rivers vested in the Indians?

The question of who owns the river bed really turns on the question of who was intended to be able to use the river itself. What was at stake in 1868 is the same thing now at stake in 1980: The right of the public to use the river for those purposes which the equal footing doctrine, as applied to navigable rivers, was designed to protect.

It is no answer to assert that the public's right of navigation is protected through the federal navigational servitude arising under the Commerce Clause. Cf., *Gibson v. United States*, 166 U.S. 269, 271-272. Surely Article II must mean the same thing when it speaks to the federal government as when it speaks to a State. If Article II vests in the Indians the sole use of the navigable river, to the exclusion of all others, the doctrine establishing an implied navigational servitude certainly must be arrested just as effectively as the equal footing doctrine.

This does not mean, however, that the Indians are precluded from having any special rights to the use of the waters of a navigable river. For example, when a tribe has a treaty right to withdraw water from a navigable river to irrigate the reservation

land, the ownership of the river bed by a State does not defeat that right. *Arizona v. California*, 373 U.S. 546, 597. A tribal water right is implied from the purpose of the reservation, but is limited to the amount needed to fulfill that purpose. It is not a right to use every drop of the water simply because it flows across the reservation. *Arizona v. California, supra.*

We see no reason why the right to take fish out of the river cannot be treated in the same manner as the right to take water. That right too can be implied, even though the State owns the river bed.

What *cannot* be implied, however, is the tribal right to the river bed itself, and the consequent right to shut off public navigation on a navigable river.[7]

II. TRIBAL CONTROL OF NON-INDIAN HUNTING AND FISHING.

Although the lower court rejected the tribe's assertion that it could *entirely* prohibit hunting and fishing by non-Indians, it did leave the tribe with very substantial regulatory power over non-Indian hunting and fishing. The court lifted the prohibition only for a resident non-Indian on his own non-Indian owned land. Tribal authority was still found to prohibit a non-Indian owner who was not a resident,

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[7]The obvious should not be overlooked. Navigable rivers were arteries for the settlement of the West. This Court apparently had this fact in mind in *United States v. Holt State Bank*, 270 U.S. 49, wherein it emphasized the fact that the lake there involved was part of a river system which provided a means of transportation all the way to Canada.

guest of the owner, and even a resident non-Indian upon a neighbor's lands, from hunting or fishing. Moreover, the tribe still has the power, under the lower court's ruling, to regulate (but not to prohibit) hunting and fishing by non-Indian residents on the land on which they reside. This tribal power is concurrent with State power, and in case of any conflict between the two, the more restrictive regulation will control.

But is there a source for this tribal power and, if so, what is it? That is the critical question presented by this aspect of the case. And that is the question this Court should answer.

The source cannot be found in any federal statute. The provisions of 18 USC § 1165 are, by the express terms of the statute, confined to hunting and fishing on *Indian* lands. Nor can the source be found in any treaty provision.

As this Court held in *Puyallup III*, the exclusive use language of Article II of the Stevens treaties, which parallels the 1868 Crow treaty, no longer applies to lands which have been sold to non-Indians. Accordingly, how can such tribal power be found in the similar language of Article II of the 1868 treaty with the Crows?

Nor can such tribal power be found in Article IV of that treaty. That article confers "* * * the right to hunt on the unoccupied lands of the United States. * * *" But the lands in question no

longer belong to the United States; they have been sold to non-Indians.

Further, even if the tribe continues to have fishing and hunting rights on these non-Indian lands, it does not follow that the tribe also has the power to regulate non-Indian hunting and fishing on these lands.

To illustrate this point: Every single part of Puget Sound, in the State of Washington, is subject to treaty fishing rights of one or more Indian tribes. *Washington v. Washington State Commercial Passenger Vessel Association, supra.* That certainly does not mean, however, that the Washington tribes can take over the functions of the Washington State Department of Fisheries and regulate the activities of non-Indian fishermen on Puget Sound.

What the tribes can do, however, is precisely what they did in *Washington v. Washington State Commercial Passenger Vessel Association, supra;* they can require the State agency to regulate the non-Indians in a manner which accommodates the treaty rights of the Indians, and allows them the full exercise of those rights. But those rights do not confer on the Indians governmental power over non-Indians.

Once again, the court below has conferred upon an Indian tribe a power over non-Indians which has no legal basis. See, *Oliphant v. Suquamish Tribe,* 544 F.2d 1007 (9th Cir. 1976), reversed 435 U.S. 191

(1978). The impact of this error by the lower court will be felt by every mainland state within the Ninth Circuit, for they all contain Indian reservations. That error should be corrected by this Court, just as it was in *Oliphant*.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

DATED this 25th day of February, 1980.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an Indian tribe which, by virtue of a treaty with the United States, has declared its dependence upon the United States, possesses, as against a subsequently admitted state, sufficient attributes of sovereignty to hold title to the beds of navigable waters which flow through its treaty-created reservation.

2. Whether the mere establishment of an Indian reservation creates a public exigency or international duty which obligates the United States to depart from the general rule requiring the United States to hold in trust title to the beds of navigable waters for subsequently admitted states.

3. Whether an Indian treaty, which guarantees an Indian tribe exclusive use and occupancy of a reservation, but makes no specific reference to beds of navigable waters, to which the fee is retained by the United States, constitutes that definite declaration or evidence of plain intent required to overcome the constitutional presumption that the beds of navigable waters are to be held in trust for subsequently admitted states.

4. Whether, congressional enactment and implementation of legislative means by which an Indian tribe can be divested of all land riparian to a navigable stream implicitly confirms a state's ownership of the bed of such stream.

5. Does not a federal patent to land within an Indian reservation, without reservation or restriction, convey title to such land as measured by applicable state law?

6. May an Indian tribe, in the absence of authorization by either treaty or federal statue, regulate or prohibit hunting and fishing by non-

Indians on lands within a reservation after such lands have been sold to non-Indians pursuant to federal law?

7. Whether a tribal resolution prohibiting hunting and fishing by non-members on their fee patented lands within the reservation, violates the due process or equal protection guarantees of the Fifth Amendment to the United States Constitution when the Tribe does not regulate any of the hunting and fishing activities of its own members.

8. Whether a tribal resolution proscribing hunting and fishing by all non-members within the boundaries of an Indian reservation, including fee patented lands within the reservation, violates 25 U.S.C. §1302(8) of the Indian Civil Rights Act.

9. Whether under Rule 52(a), Federal Rules of Civil Procedure, the lower court was justified in setting aside, *sub silentio,* those trial court findings which are supported by substantial, credible evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. 2-26)[a] is reported at 604 F.2d 1162. The opinion of the district court (Pet.App., pp. 27-55) appears at 457 F.Supp. 599. The court of appeals adopted its opinion in *United States* v. *Finch* on the river ownership issue (Pet.App., pp. 56-82), and it appears at 548 F.2d 822, vacated 433 U.S. 676.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 12, 1979. A timely petition for rehearing was denied on September 20, 1979, and a timely application for an extension of time within which to file the Petition for Write of Certiorari was granted, extending time to January 20, 1980. The Petition for Writ of Certiorari was filed on January 21, 1980 (January 20, 1980, was a Sunday.) and was granted on April 14, 1980. A timely application for an extension of time within which to file Petitioners' brief on the merits was granted, extending time to July 22, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[a] For clarification, the Petition for Writ of Certiorari will be denominated "Pet."; The Appendix to the Petition, "Pet.App."; the Joint Appendix, "J.App."; and the Appendix to Petitioners' Brief on the Merits as "App." References to the Record on Appeal will be "R., p.____" and to the Transcript, "Tr., p.____. United States exhibits have been denominated "Pl. Ex.____"; Crow Tribe exhibits as "CT Ex.____"; and the State's exhibits as "F&G Ex.____."

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

The following treaties and statues are reproduced as appendices to the petition for certiorari:

(1) Treaty of Fort Laramie, 1851, 11 Stat. 749 (Pet.App., pp. 83-87);

(2) Second Treaty of Fort Laramie, 1868, 15 Stat. 649 (Pet.App., pp. 88-96);

(3) General Allotment Act of February 8, 1887, 24 Stat. 388 (Pet.App., pp. 97-104);

(4) Crow Allotment Act of June 4, 1920, 41 Stat. 751 (Pet.App., pp. 105-118).

Other statues and constitutional provisions involved are:

(1) Act of July 12, 1960, Public Law 86-634, 74 Stat. 869, 18 U.S.C. §1165 (Pet., p. 4);

(2) The Enabling Act of Montana, February 22, 1889, 25 Stat. 676 (Pet., pp. 4-5);

(3) The Fifth Amendment to the United States Constitution (Pet., p. 5);

(4) The Indian Civil Rights Act, Act of April 11, 1968, Public Law 90-284, §202, 82 Stat. 77, 25 U.S.C. §1302 (Pet., p. 5);

(5) Rule 52(a), Federal Rules of Civil Procedure (Pet., pp. 5-6).

In addition to the foregoing, Petitioners wish to set forth the following Montana statutes:

(1) Section 70-1-202, M.C.A., which provides:

"Property of the state — what included.

The state is the owner of:

(1) All land below the water of a navigable lake or stream;***."

(2) Section 70-16-201, M.C.A., which provides:

"Owner of land bounded by water. Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

STATEMENT OF CASE[1]

The Crow Indian Reservation was created by the Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649 (Pet.App., pp. 88-96). Originally consisting of over 8,000,000 acres, by subsequent cessions it has been reduced to its present size of 2,282,764 acres.[2] Of those two million acres, approximately 700,000 or 30 percent are owned by non-members[3] or by the State or Federal Governments. (P1.Ex.1B, Tr. 25)[4]

In 1973, The Crow tribal council, in which non-members are not representated, may not vote, and may not participate (CT Ex. 67, Tr. 27; 291; J.App., p. 9), passed Resolution 74-05 prohibiting non-members from hunting or fishing within the exterior boundaries of the reservation (Pet.App., pp. 119-120). The Area Director of the Bureau of Indian Affairs (hereafter "BIA") advised the Tribe the resolution could not be enforced on fee lands because 18 U.S.C.

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[1]Petitioners, The State of Montana, Montana State Fish and Game Commission, Joseph H. Klabunde, Spencer S. Hegstead, Earl L. Sherron, Jr., Alfred L. Bishop, and Paul B. Tihista, Big Horn Rod & Gun Club, and Citizens Rights Organization, will be referred to as "the State" or "Montana." Respondents, the United States and the Crow Tribe of Indians, will be referred to respectively as "the United States" and "the Tribe" or "the Crow Tribe" or collectively as "the Respondents."

[2]*United States* v. *Montana*, 604 F.2d 1162, 1164, ns. 1 and 3 (9th Cir., 1979); Pet. App., pp. 4-5.

[3]In *United States* v. *Finch*, 395 F.Supp. 205 (D.Mont., 1975), the United States and Finch agreed that approximately 43 percent of reservation residents were non-Indian.

[4]Each party to this litigation presented their respective exhibits to the trial court in a single volume for each party, and they were not separately numbered by record page.

§1165[5] was specifically confined to: "1. Individual Indian trust land, 2. Tribal trust land, and 3. Federal land held for Indian use." (CT Ex. 71rr, J. App. 92) Nevertheless, tribal game wardens commenced to enforce the resolution. (Tr., pp. 252-253)

In 1974 James Junior Finch was arrested for violation of 18 U.S.C. §1165 when he fished in the Big Horn River[6] from riparian land owned by Montana within the Crow Reservation boundaries. The trial court acquitted Finch, based upon his finding that the Big Horn River was owned by the state. (*United States* v. *Finch*, 395 F.Supp. 205, 213 (D.Mont., 1975)) Upon appeal, the lower court reversed, holding that under the principles of *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970), the Big Horn River was owned by the Crow Tribe and, therefore, judgment should be entered against the defendant. (*United States* v. *Finch*, 548 F.2d 822, 834, Pet.App., pp. 56, 82 (1976)) This Court vacated the lower court's judgment but did not reach the issue of river ownership. (433 U.S. 676 (1977)) Both *Finch* and this case required the lower courts to consider the Crow treaties of 1851 and 1868.[7]

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[5]Act of July 12, 1960, P.L. 86-634, 174 Stat. 869; Pet., p. 4.

[6]The Big Horn River flows through the reservation from south to north and is navigable. J.App., p. 10.

[7]Treaty of Fort Laramie, 1851, 11 Stat. 749, Pet.App., pp. 83-85; Second Treaty of Fort Laramie, 1868, 15 Stat. 649, Pet.App., pp. 88-96. There was a prior treaty with the Crow in 1825 which proclaimed the supremacy of the United States and the Tribe's dependence upon it. August 4, 1825, II J.App., p. 26. The history of these various treaties has been discussed in a series of cases: *Fort Berthold Indians* v. *United States*, 71 Ct.Cl. 308 (1930); *Crow Nation* v. *United States*, 81 Ct.Cl. 238 (1935); *Crow Tribe of Indians* v. *United States*, 284 F.2d 361 (Ct.Cl., 1960); *United States* v. *Finch*, *supra*, 395 F.Supp. at 208-209, 548 F.2d 829-830, Pet.App., pp. 69-74; *United States* v. *Montana*, 457 F.Supp. 599, 601-603 (D. Mont., 1978); Pet.App., pp.2-26).

The First Treaty of Fort Laramie, 1851,[8] (Pet.App., pp. 83-87) made no specific reference to the beds of navigable waters. The United States retained the right to establish roads and posts and agreed to protect the tribes from depredations. (Arts. 2,3) The treaty described territories for each signatory tribe, but a specific reservation was not established.[9] The tribes retained the "privilege of hunting, fishing, or passing over" any of the described territories (Art. 5).

The Second Treaty of Fort Laramie, 1868 (Pet. App., pp. 88-96) also made no specific reference to the beds of navigable waters, although in Article 2, it did refer to the "mid-channel" of the Yellowstone, as did a number of subsequent cessions. See, e.g., *United States* v. *Finch, supra*, 395 U.S. at 215-220. By its terms, the tribes agreed that "bad men among the whites" would be "arrested and punished" according to United States laws. (Art. 1) The Indians retained the "right to hunt on the unoccupied lands of the United States so long as game may be found there-on, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." (Art. 4) The United States retained jurisdiction to evaluate any "depredations on person

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[8]The pre-treaty history of the reservations is described in *United States* v. *Montana, supra*, 457 F.Supp. at 602, and in the App., pp. 10-12. The reservation is located within the Louisiana Territory created in 1803. (8 Stat. 200) Paragraph 3 of that treaty provided:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

[9]*United States* v. *Finch, supra*, 395 F.Supp. at 208.

or property" and bind parties to its decision. (Art. 5) Tribal members could select parcels of land for their individual use, but the United States held complete jurisdiction over "alienation and descent of property between Indians, and on all subjects connected with the government of the Indians on the reservations and the internal police thereof, as may be thought proper." (Art. 6) To fulfill the directions given to W. I. Cullen to negotiate treaties with, *inter alia*, the Crow and to effect "'their location upon suitable reservation with means to enable them to engage in agricultural and other pursuits,'"[10] provisions were contained in the treaty to assist the Indians in the establishment of an agricultural economy. See, e.g., Articles 6, 7, 8, 9, 10, and 12.

Article 2 of the treaty carved out a specific area for "the absolute and undisturbed use and occupation" of the Indians, and the United States solemnly agreed "that no person," except those authorized "shall ever be permitted to pass over, settle upon, or reside in" the reservation. The Indians agreed to make the reservation their "permanent home" (Art. 4). Subsequent cessions of reservation lands were conditioned upon the approval of a majority of the adult male Crow Indians occupying the reservation. (Art. 11)

IMPLEMENTATION OF FEDERAL STATUTES RELATING TO THE RESERVATION.

As a result of a meeting between federal and tribal representatives in May, 1873, Congress passed the Act of April 11, 1882, 22 Stat. 42 (J. App., p. 44) ceding a portion of the reservation to the United

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[10] *The Crow Nation* v. *United States, supra*, 81 Ct.Cl. 238, 250 (1935).

States in return for the agricultural land:

> "remaining in our reservation to be properly surveyed and divided among us in severalty, in the proportions here-inafter mentioned, and to issue patents to us respectively therefor, so soon as the necessary laws are passed by Congress."

See *United States* v. *Powers,* 305 U.S. 527, 529-530 (1939).

On February 8, 1887, the General Allotment Act, 24 Stat, 388 (Pet.App., pp.97-104), was passed. With the Allotment Act, the federal government commenced a general policy of allotting tribal lands within the various reservations to individual Indians. Usually, this provided for a grant of a specified number of acres, to be held in trust for a period of 25 years, after which the allottee was issued a patent in fee. *United States* v. *Powers, supra,* 305 U.S. at 530 (1934); *Draper* v. *United States,* 164 U.S. 241, 245-246.[11]

On February 22, 1889, 25 Stat. 676, Montana was admitted into the Union upon an "equal footing with the original states." Section 4 of that act declared that the State disclaimed "all right and title" to all Indian lands until "the title thereto shall have been extinguished by the United States." (Pet., p. 5)

The provisions of the General Allotment Act of 1887 were more particularly applied to the Crow Reservation by the Crow Allotment Act of June 4, 1920, 41 Stat. 751 (Pet.App., pp. 104-118). By its provisions, all land within the reservation was allotted, except the land located in the Big Horn and

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[11]The view that Indian reservations were temporary and that assimilation into the "dominant society" was the ultimate goal was articulated by Justice McLean in 1832. *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 593. See also *Mattz* v. *Arnett,* 412 U.S. 481, 496-497 (1973).

Pryor Mountains.[12] By virtue of the 1920 Allotment Act, non-tribal members could obtain the fee to reservation land from an allottee; from the State of Montana, which was granted sections 16 and 36 (section 16); or by purchasing lots in townsites established by the Secretary of Interior (section 17). Members of the armed forces were given special preferences to reservation lands (section 15). The patent to Montana's riparian land conveyed the land, "together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging * * *." (F&G Ex. 72, Tr. 26; J.App., pp. 71, cf. Tr. 282-283)

Although the act specifically reserved power sites and minerals for the Tribe, there was no such reservation of hunting and fishing rights. (Secs. 6, 10, and 16; J.App., p. 71) The Crow Allotment Act was actively supported by the Tribe.[13]

All of the land riparian to the Big Horn River within the reservation has been allotted pursuant to the 1920 Act, except for one 40-acre tract reserved for purely tribal purposes. (J.App., p. 70) Under the act: "Every single piece of land riparian to the Big Horn River below the take area of the Yellowtail Dam ultimately could end up in non-Indian hands." (J. App., pp. 70)[14]

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[12]The mountain areas are discreet and set apart from the remainder of the reservation (See, e.g., Pl.Ex. 1 (Tr., p. 25).) and consist of approximately 400,000 acres (Testimony of Joe Medicine Crow, IJ.App., p. 70.) "The intent of the mountain reservations in the Crow bill was to reserve the Indian a place for his wild game." Pl.Ex. 18, Tr. 155. IIJ.App. 1.

[13]66th Congress, 2nd Session, April 22, 1920. Congressional Record, 1920, p. 6493-6494. App. pp. 8-9, n. 28.

[14]The location of Yellowtail Dam is indicated on Pl. Ex. 1, Tr. 25.

The tribal interpretation of patenting land was explained:

"A. I guess, although it doesn't spell it out the exact bundle of rights that the man acquires after he purchases the land, it is implied that he can hunt and fish or regulate such activities on his own fee land.

Q. Sure. And that was the concept that the Crow Tribe operated on since 1920, isn't it, Joe, that a man who owned the fee to his land had the right to regulate its use; isn't that right?

A. Yes, I guess it is implied that way. (Testimony of Joe Medicine Crow, Tribal Historian, J.App., pp. 71-72)

In reviewing court and tribal records, the witness could not find "a single instance of where a non-member of the Tribe was prosecuted for hunting and fishing on fee patented land within the reservation." (J.App., pp. 79-80)

FEDERAL, STATE, AND INDIAN ACTIONS AFFECTING HUNTING AND FISHING WITHIN THE RESERVATION.

Prior to 1868, Congress had impliedly sanctioned hunting in the Indian country for "subsistance." (Act of June 30, 1834, 4 Stat. 730, Rev. Stat. §2137.)

Residents of the State of Montana commenced fishing and hunting within the boundaries of the reservation by about the turn of the century (Tr., p.

232) and actively continued to do so until 1973.[15] Between the years 1912 to 1923, the Tribe and reservation superintendent voiced concern over non-Indian hunters on the reservation (Plaintiff's Exhibits 5 through 27, Tr., 155),[16] but there was no serious effort to prevent all hunting and fishing by non-members within the reservation.[17]

As public roads were constructed and fee land became owned by non-Indians, there was at least tacit recognition that the reservation superintendent did not have authority to prevent hunting and fishing on the patented lands or for subsistance. See, e.g., Pl.Exs. 9, 15, 17, 18, and 22, Tr., p. 155. Throughout this period of time, it was further confirmed that bird hunting and fishing were not central to a Crow Indian's diet or sport.[18]

Montana has records of planting reservation waters with exotic species of brown and rainbow trout as early as 1928 (F&G Ex. 100, Tr., pp. 309,

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[15]See Rod and Gun Exhibits 4, 5, 8, 15, 25, 26, 36, 38, 39, 41, 42, 43, 44, 45, 46, 47, 49, 54, 57, 58, 59, 60, and 61, (Tr., p. 27) illustrating that fishing and hunting were being openly pursued within the reservation without protest from either the Tribe or the BIA. See also Testimony of Helman, Tr., pp. 198-204; Lackman, Tr., pp. 213-232; Lewis, Tr., pp. 232-234; and Zimmer, Tr., pp. 241-245.

Rod and Gun Exhibits 21, 22, and 40 illustrate the common concept prevailing at that time: The mountain area — some 400,000 acres set aside for tribal purposes (Section 1, Crow Allotment Act of 1920) — was closed to hunting by Superintendent Robert Yellowtail. Rod and Gun Exhibit 55 reflects that the reservation superintendent felt it was legal to hunt on the reservation. See App., pp. 14-21)

[16]See, e.g., *United States* v. *Montana*, *supra*, 604 F.2d at 1168, Pet.App., p. 14, n. 11a.

[17]Concern was also expressed because of bad hunting practices by Indians. (Pl.Exs. 19, 23, Tr. 27, 155)

[18]Pl.Ex. 20, Tr., pp. 155, 207, 220, IIJ.App., pp. 76, 81; *R. Louie*, The Crow Indians 72 (1938).

356). Local hunting and fishing groups assisted in introducing and planting upland game birds, including ring-necked pheasant, wild turkey and chukkor partridge, with which the reservation is now well stocked.[19] The large elk herd which winters in the reservation moves seasonally into and out of the reservation, as do other big game animals. (Tr. 323-324; 351-352)

In 1960, Congress recognized the problems Indian tribes were having in controlling hunting and fishing on tribal and trust lands and passed legislation which would give Indian tribes the same protection against trespassers as non-Indians possessed. S.Rep.No.1686, 86th Cong., 2nd Ses. 2-3, 1960, F&G Ex. 97, Tr., p. 309; same text quoted in *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 204-206 (1978). See also H. Rep.No. 2593, 85th Cong., 2nd Sess.

The enactment of Public Law 86-634, July 12, 1860, 74 Stat. 869, codified as 18 U.S.C. §1165, made it a crime to go upon:

> "any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon."

It was proposed in the Subcommittee of the House Committee on the Judiciary to amend the original bill so that it extended coverage of the original bill to "Indian country" as defined in 18 U.S.C. §1151.

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[19]Tr., pp. 244, 351; Rod & Gun Exhibits 18, 19, 20, 23, 28, 29, 30, 32, 33, 34, 35, 40, 43, 47, and 54. Tr., p. 27. Landowners have built ponds on deeded land and stocked them with fish provided by the State. Tr., 280-281.

That proposal was rejected to avoid any contention that it applied to non-Indian lands within reservations. (Pet.App., pp. 124-125)

Shortly after §1165 was passed, both federal and state authorities construed its application and uniformly interpreted that provision as not applying to fee or deeded land.[20]

It was not until approximately 1965 that the issuance of a so-called "trespass permit" was inaugurated by the Crow Tribe. (Tr., pp. 234, 242, 245-247.) Subsequently, non-member hunters and fishermen would purchase a permit to go upon the tribal and trust areas without being guilty of trespass under §1165. *Id.*

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[20]See, e.g., Memorandum, August 15, 1960, from Field Solicitor to Area Director, F&G Ex. 9, Tr., 309; letter, March 13, 1961, F&G Ex. 11, Tr., 26; letter from Field Solicitor to Department of Fish and Game, March 28, 1962, F&G Ex. 12, Tr., 309; letter of June 13, 1963, from Department of Fish and Game to Superintendent of Crow Indian Agency, F&G Ex. 15; letter dated December 9, 1964, from Jack Kohler, Warden Captain, to Douglas E. West, F&G Ex. 17, Tr. 26; Fish and Game memorandum dated June 18, 1965, F&G Ex. 19, Tr., 309; Fish and Game memorandum dated August 10, 1965, F&G Ex. 21, Tr. 309; letter from Deparetment of Fish and Game to Florida resident dated September 28, 1966, F&G Ex. 26, Tr., 309; letter from Indian Commissioner to Chairman, Crow Tribal Council, dated November 20, 1973, J.App., pp. 90-92. Contemporaneous interpretation by administrative agencies is "highly relevant" evidence of legislative intent. (*Helvering* v. *Griffiths*, 318 U.S. 371, 395 (1943))

The "notion" that neither the Tribe nor the Federal Government had jurisdiction over hunting and fishing on patented fee lands within the reservation also prevailed after the period of the 1920's but before passage of §1165:

Letter of April 30, 1952, from Reservation Superintendent to Tribal Game Warden, F&G Ex. 5, Tr., p. 26; letter from Chairman, BIA, to Chairman, Crow Tribal Council, 1957,"There is a considerable area of fee-patented land within the reservation owned by non-Indians. We are not aware of any judicial decision that an Indian tribe has the power and authority to prohibit non-Indians owning land within a reservation from hunting or fishing on such land, particularly in the absence of a clearly established exclusive right in the Indians." CT Ex. 71e, Tr., p. 197.

YELLOWTAIL DAM—CATALYST FOR LITIGATION.

The United States commenced an action to condemn a site for Yellowtail Dam in 1957.[21] Subsequently, Congress passed a resolution providing for transfer of the Dam right-of-way to the United States. (July 15, 1958, Public Law 85-523) Yellowtail Dam created a fine trout fishery on the Big Horn River where before none existed (Tr., 347-348) and the creation of this fishery was one of the "public benefits" expected to accrue as a result of the Dam.[22] It was the Dam which provided the catalyst for this litigation, for in 1966, Field Solicitor Bielfeld recommended:

> "A well-supported program to develop the resources of the Big Horn River would do much to bullwark the Crows' claim of title to the bed of the river. A do-nothing attitude would suggest that resources are not important to the needs or advancement of the tribe." (F&G Ex. 23, App., pp. 25-26; see also F&G Ex. 24, Tr., p. 309)

In 1970, the Tribal Chairman wrote to Senator Mansfield, advising him that the Crow Tribe was "now assuming the management of their own reservation fish and wildlife resources" and requesting

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[21] *United States* v. *5.677.94 Acres of Land*, 162 F.Supp. 108 (D.C.Mont., 1958). The tribe consistently argued the Big Horn River was not navigable during the course of that litigation. *Id*, 113-14; *Crow Tribe of Indians* v. *United States*, civ. 214 (D.Mont.), R. 1174, 1207; cf. App. 22-27.

[22] *Crow Tribe of Indians* v. *United States*, Civ. 214, *supra*, R. 1211; F&G Ex. 95; Report by Fish and Wildlife Service, pp. 2, 3, 4, 14, 15, Tr. 26; see also, F&G Exs. 13, 16, 22, 31, 37, Tr. 26. The State conducted extensive fisheries studies on the Yellowtail Reservoir and Big Horn River before (F&G Exs. 86-90, Tr., p. 309) and after completion of the Dam. (F&G Exs. 78-85, Tr., p. 309; see App., pp. 22-26).

assistance from the Bureau of Sports Fisheries and Wildlife. (F&G Ex. 108, Tr., p. 26, App., pp. 25-26) It was also in 1970 that the Bureau first formed an agreement with the Tribe for federal assistance in fish and game managment (CT Ex. 69, Tr., p. 194)[23] but the agreement was not actually implemented until 1976 (Tr., p. 57). Although in approving their agreement with the Bureau, the Tribe recited that it was "interested in promoting * * * reservation hunting and fishing" by non-Indians on the Big Horn River (Ct. Ex. 70-b, Appendix F, Tr., p. 73), such interest was nullified in 1973 with the passage of Resolution 74-05 (Pet.App., pp. 119-120) and the arrest of James Junior Finch. (*Supra*, p. 2)

In conducting its fish and game studies on the Big Horn River, Montana has continuously operated on the assumption that, being navigable, it was owned by the State. Tr. 349-350. See also §70-1-202, M.C.A., *supra*, p. "V"; footnote 22, *supra*.

This action was instituted by the United States to "parallel" *Finch* and the chronology of events and court holdings have been summarized in Montana's Petition, pp. 6-10. Because the lower court reversed the trial court on the ownership and regulatory issues, Montana and the other Petitioners requested this Court for review.

SUMMARY OF ARGUMENT

1. The fundamental constitutional principle which vests in the states title to lands underlying navigable waters within their boundaries is premised

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[23]The Fish and Wildlife Service has never stocked any fish below the afterbay of Yellowtail Dam on the Big Horn River and confined its activities to the Mountain Area and the reservoir (Tr., pp. 79-80).

upon their inherent sovereignty and their constitutional right to be admitted into the Union on an "equal footing." Indian tribes lack those attributes of sovereignty upon which the control of navigable waters is predicated: to protect public commerce and navigation and the public fishery. Although the United States, in isolated instances, has been held to have departed from its constitutionally impossed trust obligation when acting under some "international duty" or "public exigency," it has done so only when a "definite declaration" or "very plain intent" was found to exist. Neither the Treaty creating the Crow reservation nor subsequent events disclose that this double pronged test was satisfied in this case. Certainly, this Court has not carved out any general exception to the "equal footing" doctrine merely because the United States had established an Indian reservation. Since the United States did not convey the fee to the bed of the Big Horn River prior to Montana's statehood, the title thereto was constitutionally vested in the State upon its admission into the Union in 1889.

2. The extent of riparian rights appurtenant to fee patented lands abutting a navigable stream within or adjacent to Indian reservations, is measured by reference to state law. Montana law provides riparian ownership extends to low-water mark on navigable streams. The lower court's failure to follow this basic rule of patent construction should be reversed.

3. By authorizing the sale of reservation lands, without any restrictions, the Federal Government extinguished Indian title to that land. Once former Indian lands are held in fee, all land value constituents are measured by state law. Among those rights which attach to the fee is the right to hunt

and fish. The exclusivity which the United States originally guaranteed the Tribe has been expressly diluted. Since the Tribe does not hold the status of sovereign as to non-tribal members on the reservation, absent a specific delegation of authority in a statue or treaty, they do not possess authority to regulate hunting and fishing activities of non-members on their fee lands.

4. Regulation of hunting and fishing rights, to pass constitutional muster, must be rational. No rational basis exists for the Crow Tribe's facially discriminatory resolution prohibiting the exercise of such rights only by those who have no voice in tribal matters, i.e., non-tribal members. This Court's interest in freeing its citizens from "unwarranted intrusions on their personal liberty" requires that such a summary, arbitrary, and discriminatory regulation be struck down as violative of the Fifth Amendment. The lower court's attempt to interpolate a limitation of application of the tribal resolution to *resident* fee owners only serves to aggravate, rather than ameliorate, objectionable discrimination.

5. The Indian Civil Rights Act prohibits an Indian tribe from denying "any person within its jurisdiction the equal protection of its laws or depriving any person of liberty or property without due process of law." No rational basis exists for the Tribe to discriminate against non-Indians in the patently arbitrary fashion exhibited by Resolution 74-05, and, as a result, it is unenforceable.

6. In the numerous cases in which the courts have reviewed questions of water ownership and tribal jurisdiction, they have carefully scrutinized all relevant facts and construed Indian treaties and laws in light of the "common notions of the day and the assumption of those who drafted them." Where the

factual findings are so integrally related to treaty or statutory construction that a final decision must rest in part on those findings, an appellate court is not free to set them aside unless they are "clearly erroneous." In this case, all major issues were illuminated in light of the "notions of the day," contemporary construction by federal and state agencies, and by knowledge and presumptions under which the Crows themselves operated. While there were some conflicts in the evidence, those conflicts were resolved in favor of Petitioners, and the lower court was not free to set aside the trial court's findings which were based upon relevant and probative evidence.

ARGUMENT

I.

IN ESTABLISHING THE CROW INDIAN RESERVATION, THE UNITED STATES DID NOT WITHHOLD THE BIG HORN RIVER FROM THE FUTURE STATE OF MONTANA

A. *The Dependent Status of the Crow Tribe Is Inconsistent with Ownership of Navigable Waters.*

Ownership of navigable waters by the states finds its source in the English common law (*Martin* v. *Waddell*, 41 U.S. 366, 410-411 (1842); *Pollard's Lessee* v. *Hagan*, 44 U.S. 212, 229 (1884)), as modified by "our own institutions." *Pollard*, *supra*, at 229. Through the American Revolution, the states themselves became sovereigns, and it is because of

this sovereignty that they have the absolute right to all soils underlying navigable waters within their borders. (*Martin* v. *Waddell, supra; Pollard, supra,* at 229; *S. Clair County* v. *Lovington,* 90 U.S., 23 Wall 46, 65 (1874); *Shively* v. *Bowlby,* 152 U.S. 1, 36 (1894)) The soils beneath navigable waters were withheld from grants by both the King of England and the United States to fulfill sovereign trusts to the public: The common and public rights to navigate and engage in commerce upon navigable waters and the common and public right to the fishery. (*Shively* v. *Bowlby, supra,* 152 U.S. at 17.[24]

> "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign, of the lands to be held in private ownership or *transfer of sovereignty itself.*" *United States* v. *Oregon,* 295 U.S. 1, 14 (1935); see also *Oregon* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 370, 373 (1977), and *Massachusetts* v. *New York,* 271 U.S. 65, 89 (1926).

The Crow treaties do not reflect the "transfer of sovereignty" upon which ownership of navigable waters is dependent. Cf. *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 208, 210, 211 (1978). While Indian tribes who have preserved their tribal relations retain a "semi-independent" position, they do not have the sovereign status of a state or nation. (*Oliphant, supra,* at 211; *United States* v. *Kagama,* 118 U.S. 375, 379 (1885)) Various provisions of the 1868 treaty with the Crow either declare or imply that tribe's "dependence" and its loss of sovereign-

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[24]See also: *Barney* v. *Keokuk,* 94 U.S. 324, 338 (1877); *Hardin* v. *Jordan,* 140 U.S. 371, 381 (1891).

ty—even over its own territory. See, e.g., Arts. 1, 5, 7, 7, 8, 9, and 10, Pet. App., pp. 88, 90-95.

Indian tribes do not hold those sovereign powers, the exercise of which is inconsistent with their dependent status (*Oliphant, supra,* 435 U.S. at 208; *United States* v. *Wheeler,* 435 U.S. 313, 323) or "the overriding interests of the National Government." (*Washington* v. *Confederated Tribes of the Colville Indian Reservation,* ____U.S. ____, 48 L.W. 4668, 4673 (1980) The sovereign powers retained by Indian tribes are those which are necessary to control their "internal and social relations" so far as "not brought under the laws of the Union *or of the State within whose limits they reside.*" (*United States* v. *Kagama, supra,* 118 U.S. at 381-382; emphasis supplied.) These powers have been delimited to include the power to enact and enforce laws applicable to tribal members; to determine tribal membership; regulate domestic relations among tribal members; establish rules for the inheritance of property (*United States* v. *Wheeler, supra,* 435 U.S. at 322, footnote 18); and, most recently, the power to "tax transactions occurring on trust lands and significantly involving a tribe or its members." (*Colville, supra,* 48 L.W. at 4673)

By virtue of their dependent status, the Tribe has lost the power to alienate their land; to enter into direct commercial or governmental relations with foreign nations; and to subject non-members to their criminal laws and try them in tribal courts. (*Wheeler, supra,* at 326)

In *Wheeler,* this court explained that the tribes' loss of sovereign powers followed from their dependent status within federal and state territorial jurisdictions, which is necessarily inconsistent with their ability to independently determine their exter-

nal relations. (*Wheeler, supra,* at 326) Existence of full tribal sovereignty is also inconsistent with congressional policies, which seek accommodation between the interests of the Tribe and of the State (*Colville, supra,* at 4674).

In comparing the remnants of sovereignty which a tribe possesses with the purposes subserved by state ownership of navigable waters, it would be paradoxical for the United States to vest title to a resource which is a vital part of commerce in an entity which has been divested of freedom to independently determine its relationships other than those affecting purely "internal and social relations." (*United States* v. *Kagama,* 118 U.S. 375, 379 (1886); *United States* v. *Wheeler, supra,* 435 U.S. at 422-426.

B. *No International Duty or Public Exigency Existed for the United States to Depart from the General Rule Vesting Montana with Title to Navigable Waters.*

Before the United States may depart from its trust obligation imposed by the Constitution to hold title to soils underlying navigable waters for the future states, there must exist some "international duty or public exigency." (*United States* v. *Holt State Bank,* 270 U.S. 49, 55 (1926); *Shively* v. *Bowlby,* 152 U.S. 1, 49-50 (1894); *Packer* v. *Bird,* 137 U.S. 661, 672 (1891).) Such a "public exigency" or "international duty" was recognized to exist under the exceptional circumstances studied in *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970).

In *Choctaw,* the United States, by treaties, had conveyed fee simple title to a large tract of land to the Choctaw and Cherokee Indians. By those treaties, the United States guaranteed that no portion of the territory would be included within any

state or territory and provided the tribes with strong assurances of self-government and law making powers.[25] As this court observed, the Choctaw reservation was "for most purposes * * * to be considered as an independent country." (*Atlantic & Pac. Rr. Co.* v. *Mingus,* 165 U.S. 413, 435-436 (1897).) The lower court here did not articulate the international duty or public exigency which brought this case within the *Choctaw* exception but, rather, relied upon those treaty provisions which guaranteed the Crow "absolute and undisturbed use and occupation" and that "no person except those herein designated and authorized to do so * * * shall ever be permitted to pass over, settle upon, or reside in" the reservation.

While these provisions declare the Crow will enjoy exclusivity, it does not necessarily follow that the bed and banks of the Big Horn River were being conveyed to them. Ownership and exclusivity are not necessarily synonymous. Ownership of the river does not guarantee exclusivity, because regardless of ownership, the river is still subject to the servitude of public navigation. See, e.g., *Illinois* v. *Ill. Cent. R. Co.,* 146 U.S. 387, 435, 455, 458 (1892); 33 U.S.C., §10.[26] Every other duty which the United States, as trustee, owed the Tribe and every other right which the Crows had in the river were and are preserved without the necessity of conveying river ownership.

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[25]Treaty of Dancing Rabbit Creek, September 27, 1820, 7 Stat. 333, F&G Ex. 67; Treaty of New Echota, December 29, 1835, 7 Stat. 478, F&G Ex. 68, Tr., p. 26.

[26]Act of March 3, 1811, 2 Stat. 606; cf. Act of May 18, 1796, 1 Stat. 468, 43 U.S.C., §931. The United States has admitted that the Big Horn River is burdened with navigational servitude and that abutting landowners possess riparian rights.(J.App., pp. 4-6, answers 28, 37 40, 41, 42.

The Tribe possessed and possesses to this date the right to navigate the river,[27] fish in its waters,[28] dock out to navigable water,[29] use water for irrigation purposes,[30] own land to low-water mark,[31] and finally, by Section 10 of the Allotment Act of 1920, own all sites valuable for power.[32] None of these rights are dependent upon river ownership.

By 1868, case and statute law had insulated the Indians from unauthorized state incursions.[33] Subsequent cases have further protected the Indians' right to self-government.[34] Therefore, there was no duty or exigency existing in 1868 which would support departure from the constitutional obligation requiring the United States to hold the Big Horn River in trust for the future State of Montana.

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[27] *Illincis* v. *Ill. Cent. R. Co., supra,* 33 U.S.C., §10.

[28] *United States* v. *Winans,* 198 U.S. 371 (1905).

[29] *United States* v. *Holt State Bank,* 270 U.S. 49, 59 (1926); *Namen* v. *Confederated Salish & Kootenai Tribe* v. *Namen,* 380 F.Supp. 452, 466 (D.Mont., 1974) 534 F.2d 1376 (9th Cir.) cert.den. 429 U.S. 929 (1976); see also Answers to Interrogatories of United States, J.App., pp. 4-6.

[30] *Winters* v. *United States,* 207 U.S. 564 (1907); *United States* v. *Powers,* 305 U.S. 527, 532 (1934).

[31] See pp. 27-29, *infra.*

[32] Pet.App., p. 112; *supra,* p. 6.

[33] *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832). Cf. Organic Act for Territory of Montana, Sec. 1, May 26, 1864, 13 Stat. 85 (J.App., pp. 29-43); Trade and Intercourse Act of June 30, 1834, 4 Stat. 729.

[34] See, e.g., *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978); *United States* v. *Wheeler,* 435 U.S. 313 (1978); *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976); *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973); *Williams* v. *Lee,* 358 U.S. 216 (1959).

C. *The treaty of 1868 Does Not Address Ownership of Soils Underlying Navigable Waters. Since the United States Retained the Fee to Those Soils, the Treaty, Together with Subsequent Events, Confirms the Constitutional Presumption that They Were Retained for the State.*

The Treaty of 1868 was one of many contemporary treaties which reserved to Indian tribes vast acres of land within which ran miles of navigable waters. Nearly each of those treaties contained language identical or nearly identical to that contained in Article 2 of the Crow Treaty.[35] At the time the treaty of 1868 was negotiated, the Crow were a nomadic tribe following the buffalo culture. (J.App. "I", p. 74) Fish were not a mainstay of their diet, and their disinterest in fish continues to this day. (*Supra*, p. 8)[36] Nor were the Crow dependent upon the Big

[35]Treaty with Cheyenne and Arapahoe, October 28, 1867, 15 Stat. 598, Art. 2, Art. 12 (no cession); Treaty with the Northern Cheyenne & Northern Arapahoe, May 10, 1868, 15 Stat. 655, Arts. 2, 8 (no cession); Treaty with Shoshoni and Bannock, July 3, 1868, 15 Stat. 673, Arts. 2, 11 (no cession); Treaty with Sioux, et al., April 29, 1869, Arts. 2, 12 (no cession); Treaty with the Ute, March 2, 1868, 15 Stat. 619, Arts. 2, 16; Treaty with Kiowa and Comanche, October 21, 1867, 15 Stat. 581, Art. 2; Treaty with the Cheyenne, et al., October 14, 1865, 14 Stat. 703, Art. 2; Treay with Navajo, June 1, 1868, 15 Stat. 667, Arts. 2, 11 (similar language in Treaty with the Klamath, et al, October 14, 1864, 16 Stat. 707, Art. 1; Treaty with the Nez Perces, June 9, 1863. The court also relied on Article 11 of the treaty, requiring tribal consent to future cessions as a recognition of their "extensive ownership rights." however, a similar consent requirment was contained in the Act of January 14, 1889, 25 Stat. 642, studied by the court in *United States* v. *Holt State Bank, supra*, 270 U.S. 49 (1926). This provision should be constrasted with the *Choctaw* treaty which contemplated no future cessions. The provision for future cessions brings the case closer to *Holt* for that reason.

[36]Indian dependence upon fish has been a significant factor in other decisions involving Indian ownership or use of navigable waters. See, e.g. *Skokomish Indian Tribe* v. *France*, 320 F.2d 205, 212 (9th Cir., 1963); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918).

Horn for travel. (*United States* v. *State of Montana*, 457 F.Supp. at 602 (Pet.App., p. 32) Congress had acted to guarantee that all navigable waters within the Louisiana Territory would remain public highways. (Act of March 3, 1811, 2 Stat. 606, 33 U.S.C. §10)[37] The foundation for the "equal footing" doctrine had been laid down in *Martin* v. *Waddell*, 41 U.S. 366 (1842), and Congress was cognizant of its holding. (Cf. *Rosebud* v. *Kneip, supra*, 430 U.S. 584, 588 (1977)) To effectuate a grant of the soils under navigable waters "would require very plain language." *Martin* v. *Waddell, supra*, at 414.

In two cases, this Court has studied Indian treaty language to perceive whether there existed that "very plain language" authorizing a departure from the general rule. The first of these cases involved treaties with the Chippewa. (*United States* v. *Holt State Bank, supra*, 270 U.S. 49 (1926)) In 1854, the United States agreed to "set apart and withhold from sale, for the use of the" Indians, a vast area of land. (Art. 2, 10 Stat. 1109) In 1855, they agreed to reserve and set apart "a sufficient quantity of land for the permanent homes" of the Indians. (Art. 2, 10 Stat. 1165) See *Minnesota* v. *Hitchcock*, 185 U.S. 373, 389 (1902)[38] Under each treaty, the President had the right to assign portions of the reservation to individual Indians. (Cf. Art. 6 of the 1868 treaty; Pet. App., pp. 91-92) Indian title to the land was "sacred" and entitled the tribe to compensation for its disposal. (*Minnesota* v. *Hitchcock, supra*)

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[37]The Louisiana Territory was specifically held in trust for future states along with all navigable waters. (*United States* v. *Brewer-Elliot Oil & Gas Co.* (249 F. 609, 612, aff'd 270 F. 100, aff'd 260 U.S.77 (1922).)

[38]The *Holt* reservation was "a reservation within the accepted meaning of the term." *Id* at 389.

However, there was no "attempted exclusion of others from the use of navigable waters" (just as there was no such exclusion under the 1868 treaty with the Crow,[39]) and the court concluded that there "was nothing * * * which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy * * * of treating such lands as held for the benefit of the future states." (*Holt, supra,* at 58-59)

The other case in which this Court addressed the question of tribal ownership of navigable waters is *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970), a 4 to 3 decision, J. Douglas concurring and J. White dissenting. The distinguishing aspects of the treaties and the circumstances giving rise to that decision have been reviewed *supra,* pp. 18-19. Unlike the Choctaw and Cherokee Nations, the Crow Nation was not granted the fee to their reservation, and the treaty contained no stipulation that it would not be contained within any future state. (*Draper* v. *United States,* 164 U.S. 240, 243 (1896)) As in *Holt,* there was no specific reference to navigable waters or the soils under them. The fact that Article 2 of the 1868 treaty and subsequent calls go to the "mid channel" of the yellowstone and the Big Horn Rivers does not alter that conclusion. *In Holt, hundreds of square miles of navigable waters were wholly contained within the reservation! (Holt, supra,* at 58)

In *Martin* v. *Waddell, supra,* the letters patent

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[39]*The Crow Tribe of Indians* v. *United States,* (Civ. 214, D.C. Mont., 1963), R. 1174, 1208: "It is agreed that in 1825, * * * fur trappers used the river to transport their furs to St. Louis * * *. The parties do agree that in 1868, three men went down the river through the canyon. The parties agree that steam-boats penetrated as far up the Big Horn River as the site of the present town of Hardin, on the downstream or north end of the Big Horn Canyon."

specifically included, *inter alia*, "rivers, harbors * * * waters, lakes" but, like many similar charters and patents, were not construed to sever navigable waters "from the powers of government."
(41 U.S. at 414)

The "common notions of the day" were that the river was still open to commerce and to the public fishery right.[40] However, the most significant fact which distinguishes this case from *Choctaw* is that the United States has *never parted* with the fee to the Big Horn River. In *Choctaw*, it was recognized "that if title remained in the United States, it passed to Oklahoma upon admission to the Union as an incident of statehood." *Choctaw, supra*, 397 U.S. at 628. The "equal footing" doctrine so recently reconfirmed by this Court in *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373-374 (1977) forcefully declares the trust under which the United States held title to the Big Horn River. "(A) title which neither a provision in the Act admitting (Montana) to the Union nor a grant from Congress to a third party was capable of defeating." There exist no valid reasons to repudiate that doctrine in this case.

D. *Congressional Action Since 1868 Confirms Montana's Ownership of the Big Horn River.*

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[40]When Yellowtail Dam was authorized, it was assumed the river would sustain a public fishery. For years, employees of Montana's Fish and Game Department studied and planted the river without hindrance from federal authorities or objection from the Tribe. Non-member fishermen had hunted and fished the Big Horn from the turn of the century without interference until Resolution 74-05 was adopted. Montana operated on the assumption it owned the river because it was navigable — strong evidence indeed that ownership had passed to the state! *Infra*, pp. 7-10. Cf. *Martin* v. *Waddell, supra*, 41 U.S. at 414-415; *Puyallup Tribe, Inc.* v. *Washington State Game Dept.*, 433 U.s. 165, 174-175 (1977); *Oliphant, supra*, 435 U.S. at 206.

In providing for the allotment of lands within the Crow Reservation, Congress withheld 400,000 acres located in the Big Horn and Pryor Mountains (*supra*, p. 6, n. 12; Pet. App., p. 105) for the Tribe's "wild game" (pl. Ex. 18, Tr., p. 155) and cattle herd (App., p. 9, n. 28), the "balance is all to be allotted." (*Id.*) Almost all of the land riparian to the Big Horn River has been allotted, and much of it is owned in fee. (*Supra*, p. 6; F&G Ex. 50, Tr., p. 26) Theorectically, all riparian land could be owned by non-members. (J.App., p. 70)

A similar factual situation was studied by this Court in *Puyallup Tribe, Inc.* v. *Washington State Game Dept.*, 433 U.S. 165 (1977) ("*Puyallup III*"). In *Puyallup III*, this Court construed the treaty with the Nisquallys (December 16, 1854, 10 Stat. 1133) against the backdrop of subsequent legislation and events. Article II of the treaty establishes a reservation for the tribe's "exclusive use" and provided that no "white man (was to) be permitted to reside upon the same without permission of the tribe and the superintendent or agent." (433 U.S. at 174) By subsequent legislation, similar to the Crow Allotment Act of 1920, all lands were allotted, and the allottees were permitted to alienate their lands. (433 U.S. at 174) At the time *Puyallup III* was decided, the Indians has alienated all but 22 acres of their reservation, none of which was riparian to the Puyallup River, a navigable stream which bisected their reservation. The tribe argued that the treaty reserved a right to "fish free of state interference." However, this Court held that such:

> "an interpretation clashes with the subsequent history of the reservation and the facts of this case. Pursuant to two acts of Congress, 27 Stat. 633, and c1816, 33 Stat. 565, the Puyallups alienated in

fee simple absolute, all but 22 acres of their 18,000-acre reservation. None of the 22 acres abuts on the Puyallup River.[12] Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive use.'" (433 U.S. at 173, 174)

In footnote 12, the Court disparaged the tribe's argument that is owned the bed of the river:

"Counsel for petitioner (the tribe) intimated at oral argument that petitioner might contend in the future that it retained trust status title to the bed of the Puyallup River, Tr. of Oral Arg. 10. This contention is at odds with the otherwise uncontradicted findings below." (i.e. that all but 22 acres had been alienated.)

The very fact that Congress passed legislation which contemplated that Crow lands would be alienated and sold to non-members with whom the Crow Tribe was intended to assimilate speaks strongly against any notion that in 1868, trust status title to the bed of the river had passed to the Tribe. To confirm title to a navigable river in an entity which has been implicitly divested of most of the hallmarks of sovereignty and which has alienated communal title to riparian lands is a legal anachronism.

Until the Crow Tribe passed and then attempted to enforce Resolution 74-05 on the Big Horn River, "Neither the Tribe nor its members continue(d) to hold * * * river fishing grounds for 'their exclusive use.' On the contrary, it is undisputed that non-Indian licensees of Respondent fish within the reservation, and under the close supervision" of State wardens. (*Puyallup, III, supra*, 433 U.S. at 174) The Allotment Act of 1920 augmented by subsequent state regulatory action even more strongly confirms

the "notion" that the Big Horn River did not pass to the Crow in 1868. Compare *Martin* v. *Waddell, supra,* 41 U.S. at 414-415, 418.

E. *Conclusion to Part I.*

If indeed the issue of ownership is a "close" one, it is antithetic to that which is required to be "very plain" or "definitely declared" in order to rebut the presumption "confirming the absolute title of the states to the beds of navigable waters"[41] to then hold that title was conveyed to the Crows. In the absence of any international duty or public exigency, the issue should have been resolved in favor of the state.

II.

THE EXTENT OF RIPARIAN LAND OWNERSHIP GRANTED BY FEDERAL PATENT, WITHOUT RESERVATION OR RESTRICTION, IS MEASURED BY REFERENCE TO THE STATE RULE

Once the Federal Government has conveyed land by fee patent, without reservation or restriction, the incidents of ownership of the land will be measured by reference to state law. (*Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 677 (1974); *Joy* v. *City of St.* Louis 201 U.S. 332, 342-343 (1906); *Packer* v. *Bird,* 137 U.S. 661, 669 (1891))[42] That same

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[41] *Oregon* v. *Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, 373-374 (1977); see Pet., pp. 15-16.

[42] Cf. *Dillon* v. *Antler Land Co. of Wyola,* 507 F.2d 940, 942-043 (9th Cir., 1974), cert.den. 421 U.S. 992; and §6 of the 1887 Allotment Act, Pet.App. p. 102, 25 U.S.C. §*349,* involving a land dispute on the Crow Indian Reservation.

rule applies when the United States disposes of Indian lands riparian to navigable or non-navigable streams. (*Wilson* v. *Omaha Indian Tribe,* ____U.S.____, 61 L.Ed.2d 153, 168-169; *Oklahoma* v. *Texas,* 258 U.S. 574 (1922); *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U.S. 77, 88-89 (1922); *United States* v. *Oklahoma Gas & Electric Co.,* 318 U.S. 206, 209-210 (1942); cf. *Whitaker* v. *McBride,* 197 U.S. 510 (1904))

> "Grants by the United States of its public lands bounded on streams or waters, navigable or non-navigable, made without reservation or restriction are to be construed as to their effect according to the law of the state in which the land lies. * * * Where it is disposing of tribal lands of Indians under guardianship, the same rule applies." (*United States* v. *Champlin Refining Co.,* 156 F.2d 769, 773 (10th Cir., 1946), aff'd 331 U.S. 788, 789 (1947))[43]

Montana, by both statute and interpretive case law, holds that ownership of land riparian to navigable water extends to low-water mark. (Pet., p. 19, §70-16-201, MCA, p. V, *supra*) The patent, under which Montana holds title, contains no reservations or restrictions which would take the grant outside the general rule. (*Supra,* p. 6.)

Both the United States and the Tribe contend, however, and the lower court so held, that the general rule does not apply to riparian land within the Crow Indian Reservation, because to apply state law may frustrate "federal policy and functions," (*United States* v. *State of Montana, supra,* 604 F.2d

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[43]See also *Shiveley* v. *Bowlby,* 152 U.S. 1, 45 (1894); *Hardin* v. *Jordan,* 140 U.S. 371 (1891); *Choctaw & Chickasaw Nations* v. *Bd. of County Comm'ns,* 361 F.2d 932, 933 (10th Cir., 1966); and cases cited at p.18 of Pet., n. 32.

at 1173; Pet. App., p. 25), despite recognition of the fact that nearly 100 percent of all riparian land along the Big Horn River is either allotted or owned in fee. *Supra*, p. 6.

In *Wilson*, this Court held that when the United States "parted" with Indian land, the "incidents of the resulting ownership" would be determined by state law. (61 L.Ed.2d at 169, no. 18, and pp. 170-171):

> "Indeed * * * several hundred acres of land within the Barrett survey are held in fee, and concededly are not Indian property. These tracts would not be governed by federal rule."

Even if federal common law is the starting point, the federal rule *chooses* the state law to measure the extent of riparian ownership. (*Wilson*, 61 L.Ed.2d at 170-172) Respondents have not supplied "concrete evidence" that adoption of a state rule would adversely affect federal interests. *Wilson*, 61 L.Ed.2d at 172. As this Court observed in *Wilson:*

> "It is true that states may differ among themselves with respect to the rules that will identify and distinguish between avulsions and accretions, but as long as the applicable standard is applied even-handedly to particular disputes, we discern no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute." (*Id.*, at 170)

All landowners riparian to the Big Horn River will be given even treatment under Montana law, and there is no contrary, overriding federal interest discernable.

III.

WHEN THE FEDERAL GOVERNMENT CONVEYED RESERVATION LANDS TO NON-INDIANS, TREATY EXCLUSIVITY WAS DILUTED. AS A RESULT, ABSENT SPECIFIC CONGRESSIONAL AUTHORIZATION, THE CROW TRIBE DOES NOT POSSESS AUTHORITY TO REGULATE NON-MEMBER HUNTING AND FISHING ON FEE LANDS

At the outset, it is mandatory to delimit the issue raised here: Montana is not seeking to regulate or diminish Crow hunting and fishing rights within the reservation; also, this is not a case in which the Tribe's own hunting and fishing rights have been materially diminished.[44] Rather, this case involves only the question of whether an Indian tribe, which has been willingly divested of Indian title to reservation land, has the authority to regulate non-member hunting and fishing on that land.[45]

The lower court held the Tribe possessed such authority and relied upon two sources: The Treaty of 1868 "augmented" by 18 U.S.C. §1165; and "inherent" Indian sovereignty. An analysis of these sources fails to support the lower court's reliance upon them.

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[44]Tr., pp. 8-9 (State's Opening Statement); Cases such as *United States* v. *Winnans*, 198 U.S. 371 (1905), *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Antoine* v. *Washington*, 420 U.S. 194 (1975); and *Washington* v. *Fishing Vessel Ass'n*, ____U.S.____ (1979), upon which Respondents rely, involve protecting or quantifying rights which *survive* treaties, rather than the exclusion of non-members from those rights.

[45]*Puyallup, III, supra*, 433 U.S. 165, is closer to the fact situation involved here. There, also, exclusivity was diluted by subsequent legislative action. (*Supra*, pp. 25-26)

By virtue of the 1868 treaty, the Crow Tribe became entitled to the exclusive use of their reservation. However, that treaty did not restrict the power of the United States to include it within a subsequently admitted state. *Draper* v. *United States, supra,* 164 U.S. at 243. Under Montana's enabling act, jurisdiction over Indian lands was withheld only until title was "extinguished." (Act of February 22, 1889, 25 Stat. 676, Pet., p. 5) The enabling act "necessarily repealed" any treaty provision clearly inconsistent with it. *Draper, supra,* at 243; see also *The Cherokee Tobacco,* 78 U.S., 11 Wall. 616, 620-621 (1871); *Ward* v. *Racehorse,* 163 U.S. 504, 511 (1895).

By virtue of various allotment acts passed in 1882, 1887, and 1920 (*supra,* pp. 4-6), the guarantees of exclusivity, upon which the lower court relied to support the reach of Resolution 74-05 over non-members, was diluted. The allotment philosophy was aimed at the "gradual extinction of Indian reservations and Indian titles." (*Draper, supra,* 164 U.S. at 243)[46] With the allotment acts, former Indian lands[47] became owned by non-Indians. Indian title was extinguished. Concomittant with ownership was the settled rule of patent construction requiring all

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[46]Even the treaty of 1868 contemplated ownership of reservation lands by individual Indians. (*United States* v. *Powers,* 395 U.S. 527, 533 (1939))

[47]Prior to 1948, 62 Stat. 757, 18 U.S.C. §1151, "Indian country," a grant of land in fee extinguished Indian title within an Indian reservation. (*Clairmont* v. *United States,* 225 U.S. 551, 558 (1912); *Ex Parte Crow Dog,* 109 U.S. 556, 561 (1883); *Bates* v. *Clark,* 95 U.S. 556, 561 (1883); *Bates* v. *Clark,* 95 U.S. 204, 206, 207, 209 (1877); and compare *United States* v. *Soldana,* 246 U.S. 530, 533 (1918); *Dick* v. *United States,* 208 U.S. 340, 358-359 (1907); *Browning* v. *United States,* 6 F.2d 801, 802-807 (C.C.A. 8th, 1925? cert.den. 269 U.S. 568; *Trans-Canada Enterprises Ltd.* v. *Muckleshoot Indians,* No. CF-77-992-M (W.D. Wash., 1978) 5 *Indian Law Rpts.,* F-153.

rights or values in that land to be measured by state law. (*Supra*, pp. 27-28) Montana law confers upon landowners exclusive hunting and fishing rights. (*Herrin* v. *Sutherland*, 74 Mont. 587, 601, 241 P. 328 (1925); IJ.App., pp. 71-72; see also F&G Ex. 103, Tr., p. 309) The fact that at the time of the treaty this right was tribal or communal does not undermine this conclusion. Cf. *United States* v. *Powers*, *supra*, 305 U.S. at 532; *Puyallup III*, *supra*, 433 U.S. at 173-174) *Confederated Salish & Kootenai Tribes* v. *Namen*, CV-2343 (D. Mont., September 19, 1979), *Indian Law Rptr*, F-161, 169-175, final opinion filed April 8, 1980, Judge William J. Jameson presiding.)

Although it was true that the Treaty of 1868 did not deprive the Indians of "potential control over [any] source of food on their reservation" (604 F.2d at 1167, Pet.App. 12), superimposed upon the treaty and abrogating the Tribe's exclusivity were subsequent congressional acts which not only permitted but invited non-Indians onto the reservation to share in the resources found there. (IJ.App., pp.71-72) The 1868 treaty is, therefore, clearly not the touchstone upon which Resolution 74-05 was dependent. The original exclusivity has been legislatively diluted. Non-members have been invited onto the reservation and share all those reservation land and water values not specifically reserved. See IJ.App. 71-72.

Nor does 18 U.S.C. §1165 "augment" the lost exclusivity as reasoned by the lower court. 604 F.2d at 1167; Pet.App., p. 12.[48] Congress specifically rejected a proposal to expand the scope of 18 U.S.C. §1165 to "Indian country" so as to avoid "any argument that it would apply to non-Indian land." (Pet. App., p. 125) Legislative history rebuts any notion of

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[48]The Crow Tribe tacitly agrees that 18 U.S.C. §1165 does not apply to fee lands. Crow Tribe Brief in Opposition, p. 12, n. 19.

statutory augmentation. (Pet. 21-22).

The lower court's conclusion that an Indian tribe has inherent sovereignty to regulate a non-member's fee lands within the reservation absent express congressional authorization fails to take cognizance of the dependent status of the tribe and recognition that it cannot independently determine its external relations. There has occured an "implicit divestiture of sovereignty * * * involving the relations between an indian Tribe and non-members * * *." (*United States* v. *Wheeler, supra*, 435 U.S. at 326)

In the legislative history and case law relating to the allotment policy, Congress and the courts contemplated that Indians would "adopt white ways." (*Mattz* v. *Arnett*, 412 U.S. 481, 496-597; *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676, 694 (9th Cir., 1976); 66th Congress, 2nd Session, April 22, Congressional Record, 1920, pp. 6493-6494) The goal was always to "civilize" the Indian and eventually assimilate him into the dominant society. This goal is incongruous with retention of political control over land to which Indian title has been "extinguished." (*Supra*, pp. 15, 18, 31, n. 47)

Even if the test of sovereignty laid down in *Colville, supra*, 43 L.W. at 4673, were applied to a non-tax case, the tribal resolution involved here would fail to qualify[49]: First, the transaction which the Tribe is attempting to regulate, i.e., the act of hunting or fishing, takes place on non-trust lands — fee lands. Additionally, the regulation encompasses activities which were not traditionally within the Crow culture, i.e., fishing and bird hunting. Secon-

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[49]The tribal tax power was limited to "transactions occurring on trust lands and significantly involving a tribe or its members."

dly, no tribal interest is significantly involved: Tribal members rarely fish or hunt water fowl; Montana stocks fish, and non-members introduced and stocked birds; big game is primarily located in the "mountain area" and is, therefore, clearly within the reach of §1165; and finally, the migratory nature of the wild fish and game can be more significantly affected by what occurs off the reservation (Wyoming and National Forests) than what happens on it. (Tr., pp. 322-323)

Because the idea of "inherent Indian sovereignty" has given way to federal pre-emption (*McClanahan* v. *Arizona Tax Court*, 411 U.S. 164, 172 (1973)), it is also necessary to look closer at 18 U.S.C. §1165 against the backdrop of *Oliphant*. In studying the legislative history to §1165, it is apparent that Congress acted to: (1) Protect Indian lands (2) by specifically extending to Indians the right to exclude anyone from those lands; and (3) provide a criminal sanction against trespassers (4) enforced in a federal court environment in which "basic criminal rights" would attach. (*Oliphant, supra*, 435 U.S. 205-206, 211)[50] Congress adopted the same approach when it permitted Indians to enact local option liquor regulations. (Act of August 15, 1953, 67 Stat. 586, 18 U.S.C. §1161; *United States* v. *Mazurie*, 419 U.S.

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[50]"As previously noted, Congress extended the jurisdiction of federal courts, in the Trade and Intercourse Act of 1790, to offenses committed by non-Indians against Indians within Indian Country. *In doing so, Congress was careful to extend to the non-Indian offender the basic criminal rights that would attach in non-Indian related cases.* Under respondents' theory, however, Indian tribes would have been free to try the same non-Indians without these careful proceedings unless Congress affirmatively legislated to the contrary. Such an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeitures of full sovereignty in return for the protection of the United States. (*Oliphant, supra*, 435 U.S. at 211; emphasis supplied.

544 (1975)) When Congress enacted §1165 but refused to extend its scope to include fee lands within an Indian reservation, the same "basic rights" were still made available to the accused over which this Court expressed concern in *Oliphant:* Violations of §1165 would be prosecuted by the federal government in federal courts. It is incongruous to conclude that on fee lands, over which Indian sovereignty is most attenuated, if not nonexistant, that the courts would leave the Tribe free to enact and enforce the most arbitrary and discriminatory legislation conceivable.

Unlike §1165, Resolution 74-05 cannot be enforced criminally (*Oliphant, supra*), but, nevertheless, basic constitutional rights may not be available to cushion arbitrary action of the tribal council (Cf. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 47, 56 (1978)). For those reasons also, the resolution clearly exceeds Tribal authority.

B. *Conclusion to Part III:*

In *Oliphant,* and *Wheeler,* this Court has emphatically stated that Indian tribes have been implicitly divested of their right to independently determine their external relations.[51] Once the lands within the Crow reservation went out of Crow ownership, the Tribe lost the power to regulate hunting and fishing rights which were and are appurtenant to the ownership of such lands.[52] Resolution

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[51]In their Constitution, the Crow Tribe specifically acknowledges the plenary authority of the United States. Art. VII, 4, 5, 8, CT Ex. 67, Tr., p. 27; IIJ.App., pp. 59-74.

[52]The power to regulate their "internal and social relations" cannot logically be extended to include control over the exercise of nonmember property rights on fee patented lands. See *United States* v. *Kagama, supra,* 118 U.S. 375, 379 (1886); and *United States* v. *Wheeler, supra,* 435 U.S. at 322, 326.

74-05, therefore, is invalid and unenforceable.

IV.

CROW TRIBE RESOLUTION 74-05 DEPRIVES NON-INDIANS OF FIFTH AMENDMENT GUARANTEES

On its face, Resolution 74-05 denies non-members equal protection of the law. The resolution patently extends or withholds property rights because of ethnic differences. The resolution is also patently confiscatory; it deprives non-members of the right to exercise hunting and fishing privileges on their own land. Ordinarily, such a facially discriminatory action would be suspect and subjected to the strictest scrutiny. (*University of California Regents* v. *Bakke,* 438 U.S. 265, 290 (9178); cf. *Fullilove* v. *Klutznick,* ____ U.S.____, Adv. Op., p. 20 (1980))

Although this court has stated that neither the reach of the Fourteenth or Fifth Amendments can touch tribal exercise of self-government powers (*Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 56 (1978)), it has also been cognizant of its duty to protect basic "personal" rights and "liberties" of all its citizens. (*Oliphant,* 435 U.S. at 210)

The fact that the "unique" status of the Indian is preserved by the Constitution, which status immunizes certain types of federally authored preferential treatment from constitutional challenges, (see, e.g., *Morton* v. *Mancari,* 417 U.S. 535 (1974); *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976)) does not support confiscation of basic "personal" rights and "liberties" by Indian tribes themselves. This Court, in scrutinizing Indian legislation,

has emphasized that lack of participation in tribal government,[53] along with the absence of those rights Congress carefully extends to the non-Indian as would "attach in non-Indian related" cases are two of the reasons that will restrict tribal authority. (*Oliphant*, 435 U.S. at 211)

A non-Indian citizen of a sovereign state and of the United States cannot be precluded from protecting all of his property rights merely because his land lies within an Indian reservation. The lower court has held that tribal exercise of self-government powers sanctioned by the Federal Government can be so "summary and arbitrary as to shock the conscience of the federal court or goes beyond the scope of authority contemplated by the treaty." (*Settler* v. *Yakima Tribal Court*, 419 F.2d 486, 489 (9th Cir., 1969), cert. den. 398 U.S. 903 (1970)) Resolution 74-05 goes far beyond any statutory or retained treaty authority.

Resolution 74-05 also fails to pass the test of rationality applied to similar legislation authored by the states. See, e.g., *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 285 (1977); *Hughes* v. *Oklahoma*, ____U.S.____, 60 L.Ed.2d 250, 262-263 (1979); *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948). Although the Tribe made a token effort to rationalize the need for the resolution because of a fish and game shortage, the record actually reflects: (1) Big game is largely confined to the "mountain area" which is tribal land and thus subject to §1165 sanctions; (2) the Crow do not depend upon birds or

[53]Traditionally, a voter's disenfranchisement has been grounds to invoke "due process and equal protection." *Kramer* v. *Union Free School District*, 394 U.S. 621 (1969); *Cipriano* v. *City of Huoma*, 395 U.S. 701 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); and cf. *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964); Pet., p. 25, n. 49, App. pp. 28-32.

fish for their dietary needs and put little pressure upon either; (3) the Tribe did not enact, nor does it enforce, any fish or game prohibitions or regulations against tribal members, who are free to exhaust the resource. (Tr., pp. 255, 346, *infra*, n. 15; CT Exs. 76, p. 4; 70-C, p. 3, Tr. 73)[54] Non-members, of course, do not participate in the tribal council which passed Resolution 74-05. (CT Ex. 67, Tr. 27, 291) After passage, Resolution 74-05 was enforced by tribal game wardens deputized as BIA agents. (tr., pp. 252-253) Compare *Santa Clara Pueblo* v. *Martinez*, 436 U.S., *supra*, at 56, n. 7; *Settler* v. *Yakima Tribal Court*, *supra*, 419 F.2d at 489; and *Colliflower* v. *Garland*, 342 F. 2d 369 (9th Cir., 1965).

The claim that there is a fish and game shortage is "specious" when the Tribe makes no attempt to restrict the quantity of fish and game captured by its own members. (*Douglas*, *supra*, at 285) The game and fish on the Crow Indian Reservation, just as the Menhaden studied in *Douglas*, do not respect reservation boundaries or Indian lands. (*Id.*, at 285; cf. *Hughes* v. *Oklahoma*, *supra*, 60 L.Ed.2d at 263)

If we study those factors which confirmed the constitutionality of Montana's resident —non-resident license classification in *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U.S. 371, 389-390 (1978), it becomes evident that Montana's contribution to the

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[54]Mere recital of benign purposes is not an automatic shield against constitutional inquiry. *Califano* v. *Webster*, 430 U.S. 313 (1977); cf. *Bakke*, *supra*.

fish and game resource far outweighs that of the Tribe.[55]

All of the parties to this litigation have insisted that the privilege to hunt and fish constitutes a property right.[56] (Pet., p. 24, n. 47) Montana has so declared in *Herrin* v. *Sutherland*, 74 Mont. 587, 601, 241 P. 328 (1925). Yet, the Tribe has confiscated the non-Indian's property right, which is automatically attached to the fee, through a facially discriminatory resolution. The fact that the authors of that resolution are Indian cannot serve to sanctify an otherwise unconstitutional act.

Finally, the lower court's imaginative effort to soften the effect of the Tribe's patently discriminatory resolution by creating yet another sub-classification between resident and non-resident landowners only serves to illustrate the fundamental unfairness and invalidity of the entire resolution. A landowner's rights to use and enjoy his property do not hinge on residency. The fact that the lower court could not perceive a "legislative or executive solution * * * within the reasonable foreseeable future" (604 F.2d at 1172; Pet. App., p. 23) did not create judicial license to legislate its own. Once the lower court decided that a landowner did indeed possess hunting

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[55]For example, the State helps maintain the game population through state taxes; the State and non-Indians work to improve the habitat and plant fish and game; the State enforces its game regulations against non-Indians at state expense; the State enforces air and water quality laws against non-Indians. There is no evidence that the non-Indian is more of an enforcement problem than the Indian nor that he is any more likely to disregard basic conservation ethics.

[56]Compare *Menominee Tribe* v. *United States*, 391 U.S. 404, 413 (1968). The rights to "acquire, enjoy, own and dispose of property" are protected from discriminatory state action by the Fourteenth Amendment. *Shelly* v. *Kreamer*, 334 U.S. 1, 10 (1948); *Lynch* v. *HFC*, 405 U.S. 538, 544 (1972).

and fishing privileges on fee lands, then the court was compelled to confer that right evenly. The genesis of hunting and fishing rights and all values in the land is the same in all cases: Federal legislation implemented by federal patents containing uniform language. The rights which flow from this federal action must be uniformly distributed — not on the basis of residence but, rather, on the basis of land ownership — the only rational common denominator. The lower court's error should be corrected.

V.

RESOLUTION 74-05 VIOLATES THE INDIAN CIVIL RIGHTS ACT[57]

Neither the United States nor the Tribe has responded to the State's argument that Resolution 74-04 violates the Indian Civil Rights Act (hereafter ICRA). (Pet., pp. 27-28; cf. briefs in opposition) As this Court focused upon in *Oliphant, supra,* Congress modified the ICRA to include within its scope "any person." That change merely demonstrated "Congress' desire to extend the act's guarantees to non-Indians *if and when they come under a tribe's criminal or civil juirisdictions, by either treaty provision or Act of Congress.*" *Oliphant, supra,* 435 U.S. at 195, n. 6; emphasis supplied; see also, *Dry Creek Lodge, Inc.* v. *United States,* 515 F.2d 926, 934 (10th Cir., 1975); *Schanz* v. *White Lightning,* 502 F.2d 67, 70, n. 5 (ith Cir., 1974); *Hickey* v. *Crow Creek Housing Auth.,* 379 F.Supp. 1002 (D.S.D., 1974); and *Dodge* v. *Nakai,* 298 F.Supp. 17(D.Ariz.,

[57]See Pet., p. 5; hereafter the "ICRA."

1968). Although the State takes the position that there is no treaty provision or congressional act supporting Resolution 74-05, yet if this Court should find such support, then it is patent the resolution violates the fundamental precepts of 25 U.S.C. §1302 (8). See Section IV, supra; App., pp. 32-35.

VI.

THIS CASE, AT TRIAL LEVEL, INVOLVED FACTUAL ISSUES; THEREFORE, THE LOWER COURT WAS NOT WARRANTED IN SETTING ASIDE THE DISTRICT COURT'S FINDINGS ON THOSE ISSUES UNLESS THEY WERE "CLEARLY" ERRONEOUS."

The lower court, in reversing the trial court, relied in large part on its previous holding in *United States* v. *Finch*, 548 F.2d 822 (9th Cir., 1976) vacated 433 U.S. 676 (1977). For example, with regard to the issue of ownership of the bed and banks of the Big Horn River, the lower court in effect adopted *Finch, en toto,* without expressing any additional rationale. Petitioner was not a party to *Finch* except as *Amicus curiae.* As such, it had no opportunity to introduce evidence or to examine or cross-examine witnesses. The State's property and regulatory rights were not the primary issues in *Finch.* However, in the trial of the instant case, the State, for the first time, had the opportunity to participate as a full party in defense of its rights. Both the transcript and the district court's references thereto bear witness to the circumstance that the State availed itself of this opportunity only to have the lower court in effect ignore and thereby, *sub silentio,* set aside

this evidence when the trial court expressly relied upon an extensive record (Compare *Wilson* v. *Omaha, supra*, 61 L.Ed. at 173) in refusing to follow the lower court's *Finch* ruling (457 F.Supp. at 600-601, n. 1; J.App. 29-30), thus inhibiting the lower court from setting aside the trial court's judgment which was expressly predicated upon factual findings. Rule 52(a), Federal Rules of Civil Procedure; Pet. 5-6; *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949); *United States* v. *National Ass'n. of Real Estate Boards*, 339 U.S. 485, 495-496 (1950); *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 332 (1952)

The fact that Indian treaties and statues are the focal point of attention does not make in-applicable Rule 52(a). In *Martin* v. *Waddell, supra*, 41 U.S. at 414-415, 418; *Holt, supra*, 270 U.S. at 58; *Choctaw Nation* v. *Oklahoma, supra*, 397 U.S. at 634; *Puyallup III, supra*, 433 U.S. 174; and *Skokomish Indian Tribe* v. *France*, 320 F.2d 205, 212 (9th Cir., 1963), the courts examined and relied upon facts relating to execution of treaties and land grants and subsequent interpretations placed upon them. In *Oliphant, supra*, 435 U.S. at 206; *Rosebud Sioux Tribe* v. *Kniep*, 430 U.S. 584, 604-605; and *Puyallup, III, supra*, 433 U.S. at 175, this Court made extensive use of trial evidence bearing on jurisdictional issues to assist it in making its decisions. Since the trial court's decision was expressly predicated on the extensive record in this case, Rule 52(a) prohibited the lower court from reversing his judgment.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request this Court to reinstate the district court's judgment (IJ. App. 103-104.)

RESPECTFULLY SUBMITTED this _____ day of July, 1980.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE STATE OF MONTANA, ET AL.,
Petitioners

v.

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CROW TRIBE

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BRIEF FOR THE CROW TRIBE

STATEMENT

The Crow Tribe adopts the United States' preliminary paragraphs, and its Statement of Facts, with the following additions.

By way of prologue, we would point out the overwhelming importance of the streambed issue. The real concerns of the Tribe and the local citizens have almost entirely to do with sports fishing in the Big Horn River below the dam, and duck hunting on the surface of and over the Big Horn River (there is not much real concern about other types of hunting and fishing). Both of these concerns will be settled if this Court concludes that the United States holds the bed in trust for the Tribe, because the Tribe would then have the clear power to exclude non-Indians from the River, and violators would face federal prosecution under 18 U.S.C. § 1165. The streambed issue is argued in Section I below.

On the other hand, if the Tribe is not the beneficial owner of the streambed, then it may still have the power

to ban hunting and fishing, enforceable by civil remedies, because of its special property right in the fish and game on the reservation, or because of its inherent sovereign powers to regulate activities on the reservation. These are argued in Section III below.

The Tribe wishes to emphasize the chronological sequence of events.[1] The first formal relations between the United States and the Crow Tribe occurred in the Treaty of 1825, 7 Stat. 266, J. App. II, 26. The next occurred in the Fort Laramie Treaty of 1851, 11 Stat. 749, Pet. App. 83. At this time emigrants were passing through the Crow country, but there were no white settlements. The country recognized by the United States as the Crows' encompassed over 38,000,000 acres, 81 Ct. Cl. at 247, which is the equivalent of a tract 300 miles by 200 miles.

In 1864 the white influx into the region had become sufficient that the Territory of Montana was created, including within it the Crow country. The Territorial Act declared (13 Stat. 85, Pet. App. 37):

> ". . . *Provided, further,* That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians . . . ."

By 1868 miners and settlers had invaded the Crow country, and to relieve the tension the United States

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[1] Histories of the Crow Tribe may be found in the testimony of the tribal historian, Joe Medicine Crow, J. App. I, 35-37; *United States* v. *Powers*, 305 U.S. 527, 528-531 (1939); *Crow Nation* v. *United States*, 81 Ct. Cl. 238, 242-257 (1935); *Crow Tribe* v. *United States*, 284 F.2d 361, 364-67 (Ct. Cl. 1960), *cert. den.*, 366 U.S. 924; *Crow Tribe* v. *United States*, 3 Ind. Cl. Comm. 147, 159-164 (1954), and 6 Ind. Cl. Comm. 112, 113-116 (1958); and in the first opinion of the court below, Pet. App. 69-74.

procured the cession of over three-quarters of the Crow country. The remainder, about 8,000,000 acres, was—

> "set apart for the absolute and undisturbed use and occupation of the Indians . . . and the United States now solemnly agrees that no persons [with exceptions not relevant] . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . . ." Treaty of 1868, 15 Stat. 649, Pet. App. 89.

"Ever" turned out to be less than five years. Because of wholesale trespasses by miners and others, the United States in 1873 negotiated another cession, whereby the Crows would have removed to an even smaller reservation. This agreement, however, was never ratified by Congress. See details, pp. 21-24 below.

In 1889, Montana became a state. Section 4 of the Statehood Act, 25 Stat. 676, provided that the people of the state—

> ". . . forever disclaim all right and title . . . to all lands lying within [the state] . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . ."

In 1920 Congress passed the Crow Allotment Act, 41 Stat. 751, Pet. App. 105-118. This Act is the basic framework for the modern status of the reservation. It called for allotment of the non-mountainous land among the Crow Indians. Pet. App. 105-6. Minerals were reserved to the Tribe for fifty years. Pet. App. 109. Lands capable of water power development were to be reserved to the Tribe. Pet. App. 112. Provisions were made rela-

tive to cattle ranching and irrigation of farmland. Secs. 8 and 11, Pet. App. 110-15. Allotments (except for competent Indians) were to be held in trust for 25 years, Pet. App. 106, since extended indefinitely, 25 U.S.C. § 462.

After allotments the remaining lands were *not* opened to settlement or homesteading, as had happened on other reservations, see *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). However, non-Indians could buy an allotment if the allottee had been declared competent and owned his allotment in fee and wished to sell, or could buy (in fee) a trust allotment with the consent of the allottee and the Secretary of the Interior. Pet. App. 106, 116. Certain tribal lands were "granted" by Congress to the State for school purposes, Pet. App. 117, and the State could sell these to non-Indians. The Tribe could not alienate land. Fee patents could be converted back to trust for land exchange and consolidation purposes. Sec. 14, Pet. App. 116, see also 25 U.S.C. § 465.

The 1920 Act also recognized the Crow Tribal government:

> "Sec. 18. That the sum of $10,000, or so much thereof as may be necessary, of the tribal funds of the Crow Indians of the State of Montana, is hereby appropriated *to pay the expenses of the general council, or councils, or business committee, in looking after the affairs of said tribe*, including the actual and necessary expenses and the per diems paid its legislative committee when visiting Washington on tribal business at the request of the Commissioner of Indian Affairs or a committee of Congress, said sum and the actual and necessary expenses to be approved by and certified by the Secretary of the Interior, and when so approved and certified to be paid: *provided*, That not to exceed $2,500 shall be ex-

pended in any one fiscal year." Pet. App. 118, emphasis added.

While virtually all of the riparian land below the Yellowtail Dam has been allotted to tribal members (the only exceptions being a few small tribal parcels), J. App. I, 70, the fact is that only a few allotments have been sold out of Indian ownership, such as the ones the State owns. Pet. Br. App. 25. The Crow Reservation and the Crow tribal government are fully functioning institutions.

It is true that the State and some private landowners did some stocking of fish and small game on the reservation, but this was not done with tribal permission. J. App. I, 54. The Bureau of Indian Affairs did some stocking of buffalo and elk. *Id.* 54-55, 98. The Tribe stocks fish under the supervision of the U.S. Bureau of Sports Fisheries and Wildlife. J. App. II, 83-85, Tr. 68-69. The Bureau itself also stocks fish. J. App. I, 84.

A major question at trial was the extent to which the Crows traditionally fished. The trial court found that "fishing was not a central part of the Crow diet." Pet. App. 32.[2] The Tribe takes no exception to this finding other than to note that the Crows did eat fish to supplement their main diet of buffalo meat, J. App. I, 39, 90, 97, and continue to fish in modern times for personal use, *id.*, 50, 53-54.

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[2] The court (Pet. App. 32) found that the first written reference to fishing and the Crow Indians (the cite is apparently J. App. II, 112) occurred at a negotiation meeting that resulted in a further cession of the Crow Reservation in 1882. That this was the first reference is true only if the reference to fishing in the 1851 Treaty is ignored, Pet. App. 86, Art. 5, and see also reference to fish in 1867, p. 20 below. The meeting referred to by the trial court was apparently the negotiation meeting for the unratified treaty of 1873, 4 Kapp. 1142. This had nothing to do with the cession of 1882, 22 Stat. 42. See Royce, *Indian Land Cessions* 864 (1900). Petitioners make the same error, Pet. Br. 4.

There is also evidence in the record that the Big Horn River had religious and cultural significance to the Tribe. The bed of the river provided sea shells which were used as medical cures. Testimony of Old Coyote, J. App. I, 97-98. Rocks in the bed were used for heating sweat lodges and for body purification. *Id.* In a story handed down to Henry Old Coyote, which constitutes an oral history of the Tribe, there is a legendary account of how one of the great leaders of the Tribe was rescued by the Big Horn Sheep of the Big Horn River, who told him that if the name of the river was ever changed there would be no more Crow. J. App. III, 193. This leader, Big Metal, is believed to be buried under the bed of the Big Horn River. J. App. III, 196.

SUMMARY OF ARGUMENT

I

It is undisputed that the United States has the power to grant the beds of navigable streams to Indian tribes. The question is only whether the United States intended to do so. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970).

Examining the negotiations and surrounding circumstances of the 1851 and 1868 Treaties, and the disclaimers by the Territory and State of Montana, the conclusion is inevitable that the Crow case cannot be distinguished from the Choctaw case, and that therefore the Crow Tribe owns the bed within its present day Reservation. The summary list of factors supporting this conclusion appears at pp. 28-29 below.

II

The Tribe's ownership of the bed carries up to the high water mark, not merely the low water mark, because the individual Indians' allotments of the upland

only carried down to the high water mark, and they could convey to their purchasers no more than they owned.

III

The Tribe may prohibit non-Indians from hunting and fishing anywhere on the reservation, including fee land.

A. The Tribe owns the exclusive right to take game and fish on the reservation, and for non-Indians to hunt or fish on the reservation without tribal permission is an infringement of that property right. See *United States* v. *Winans*, 198 U.S. 371 (1905); *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629 (1954). The right arises from the express hunting and fishing right mentioned in the 1851 Treaty, coupled with the original exclusive ownership of the reservation, and the original hunting and fishing economy therein, and continues throughout the reservation even though individual parcels of land are sold out of Indian ownership. The one exception is the one declared by the court below, that people who live on fee land on the reservation cannot be barred from hunting and fishing *on their own land* (but they may be reasonably regulated).

B. Alternatively, the Tribe as the sovereign government of the reservation has civil jurisdiction to regulate hunting and fishing throughout the reservation, including on fee land, and this jurisdiction includes the power to bar all hunting and fishing by non-Indians for reasons of conservation, except, again, for fee land residents.

IV

Crow Tribal Resolution 74-05 neither deprives non-Indians of Fifth Amendment guarantees nor does it violate the Indian Civil Rights Act.

V

The court below did not act contrary to F.R.C.P. 52 (b) in reviewing the district court's findings.

ARGUMENT

I. THE CROW TRIBE OWNS THE BED OF THE BIG HORN RIVER

In Section A of Part I we argue that the United States has the power to grant the beds of navigable streams to Indian tribes (or more precisely, in this case, recognize the Crow Tribe's pre-existing ownership of such beds). The question is what the United States intended, and that may be construed according to what the Tribe understood, following well settled canons of construction.

In Section B we analyze the facts and surrounding circumstances of the Treaties of 1851 and 1868, which show clearly that the Tribe would have understood that its territory being recognized or granted by the Treaties included the streambeds, and the United States cannot honorably have entertained any contrary thought.

In Section C we discuss other relevant legislation, including the Montana Territorial and Statehood Acts, which require Montana to disclaim any title to Indian lands, and the statutes of 1882 and 1891, which use terms such as "the mid-channel" to run reservation boundaries.

In Section D we sum up the reasons why the Court must conclude that the Tribe owns the streambed.

A. The Bed of a Navigable River Can Be Conveyed to an Indian Tribe, If That is What the U.S. Intended

It is a well established principle that beds of navigable rivers can be granted away before the territory in which they are located becomes a state. Although it was stated in *Pollard's Lessee* v. *Hagan*, 44 U.S. 212, 220-230 (1845), that there could not be an alienation of lands

beneath navigable rivers, this Court recognized just five years later that this statement was less than absolute. In *Goodtitle* v. *Kibbe*, 50 U.S. 471 (1850) this Court determined that Congress could have granted the land to a private patentee before Alabama became a state.

In *Shively* v. *Bowlby*, 152 U.S. 1 (1894), this Court further delineated the rule that grants of lands underlying navigable waters could be conveyed prior to statehood and set up some general guidelines under which such a grant could be made:

> "We cannot doubt, therefore, that Congress has the power to make grants of lands below the high water mark of navigable waters in any Territory of the United States whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." 152 U.S. at 48.

It is important to realize that while this body of law was developing with respect to title to riverbeds, this Court was also considering the nature of Indian title to the lands set out for them by Congress in treaty or statutes; lands that in most instances included by metes and bounds description navigable rivers and the beds beneath them. In 1823, Chief Justice Marshall, *Johnson* v. *McIntosh*, 21 U.S. 543, 574 (1823), stated that the Indians' title, by virtue of their occupancy of American land, gave them "a legal as well as just claim to retain possession of it." He added, however, that the United States could extinguish the Indian interest by purchase.[3] The princi-

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[3] *Id.* at 583. This principle was reaffirmed by this Court in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667 (1974).

ple of Indian title set forth in *McIntosh* was further expounded on in *Worcester* v. *Georgia*, 31 U.S. 515 (1832), where it was said that the State of Georgia could not exercise jurisdiction over Indian lands, *i.e.*, that Indian title could not be ignored by a state.

Thus, these early cases recognized the validity of Indian title against all but the discovering nation and the necessity of purchasing such title in order to validly extinguish it. It is noteworthy that both *McIntosh* and *Worcester* were the state of the law with regard to Indian title at the time of *Martin* v. *Waddell*, 41 U.S. 367 (1842), and *Pollard*, which are relied on so heavily by the Petitioners and their amici curiae.[4]

In *United States* v. *Winans*, 198 U.S. 371, 379 (1905), the Indians ceded land, but retained fishing rights at their usual places in the ceded area. The question was whether a treaty reserved to the Indians an easement across privately owned land to enable the Indians to reach their usual places. The treaty was silent, and so were the patents issued by the U.S. to the private owners. The Court stated:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. *In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.*" 198 U.S. at 380, emphasis added.

The *Winans* case is relevant because it emphasizes the true nature of the transaction when Indians cede land

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[4] *Pollard* is also distinguishable because it involves a grant after Alabama became a state.

to the U.S.—the U.S. only acquires what the Indians agree to give up.[5] If the Indians do not give up the beds of rivers in their land, the U.S. does not acquire them, at least not free of the Indians' title.

In 1918, in *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), this Court ruled that beds underlying navigable waters were included within the bounds of an Indian reservation even though no specific mention of the beds was made.[6] The standard to be used in determining whether a grant was made was to be examination of the circumstances and the intent of Congress in making the treaty. The Court said:

> "As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the islands, the solution and needs of the Indians and the object to be attained.
>
> "That Congress had the power to make the reservation inclusive of the adjacent waters needs little more than statement." 248 U.S. at 87.

In *Donnelly* v. *United States*, 228 U.S. 243 (1913), an Executive Order created an Indian reservation described as "a tract of country one mile in width on each side of the Klamath River" and about 40 miles long. The Court held that the government intended to include the riverbed in the reservation, although no specific mention of it was made: "[I]t would be absurd to treat the [Execu-

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[5] See also, *Tulee* v. *Washington*, 315 U.S. 681, 684-85 (1942).

[6] It is not inconsistent to grant the bed of navigable waters to an Indian tribe while reserving the federal navigation servitude. *Moore* v. *United States*, 157 F.2d 760, 765 (9th Cir. 1946); *United States* v. *Pollmann*, 364 F. Supp. 995, 1000 (D. Mont. 1973). The court below so held, Pet. App. 74.

tive] order as intended to include the uplands to the width of one mile on each side of the river, and at the same time to exclude the river." 228 U.S. at 259.

These holdings are in line with an extensive body of lower court case law.[7]

On the other hand, this Court held in one case, *United States* v. *Holt State Bank*, 270 U.S. 49 (1926), that disposal of land underlying navigable waters was not to be regarded as intended unless the intention was definitely declared or otherwise made very clear. In that case, the Red Lake Chippewas ceded by treaties ending in 1855 all but a section of their aboriginal territory. They continued to hold the remaining section, but there never was any formal grant of that section to them. In that section was a lake. Minnesota became a state in 1858. In 1863 the Red Lake Reservation was impliedly recognized as a reservation in a treaty of cession, 13 Stat. 667. In

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[7] In *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir. 1942), the court held that the Flathead Tribe owns the bed of Flathead Lake to the extent it lies within the reservation boundaries, though the treaty said nothing about the bed. This was followed in *United States* v. *Pollmann*, 364 F. Supp. 995 (D. Mont. 1973).

United States v. *Romaine*, 255 F. 253 (9th Cir. 1919), held that the Lummi Reservation included the tidelands adjacent to the Reservation, though the grant was silent on the issue. Followed, *United States* v. *Stotts*, 49 F.2d 619 (W.D. Wash. 1930).

In *Taylor* v. *United States*, 44 F.2d 531 (9th Cir. 1930), *cert. den.*, 283 U.S. 820, the court, thinking that the Quileute Reservation was established after Washington became a state, held that the bed of the Quileute River within the reservation belonged to the state, not the Tribe. Consequently, a non-Indian could anchor a barge on the bed of the river within the reservation. However, the court later discovered that the Quileute Reservation had been established *before* Washington became a state, and reversed its ruling. *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946), *cert. den.*, 330 U.S. 827. And see *Antoine* v. *Washington*, 420 U.S. 194, 200-204 (1975), holding that *even after statehood* Congress can create Indian property rights (off-reservation hunting rights) which are exempt from state regulatory power.

1889 the Red Lakes ceded their reservation, including the lake, to the United States, which in turn sold the land to homesteaders. The lake was drained around 1912 and the riparian homesteaders took possession, assuming that the former bed passed to them under state law. Around 1923 the United States sued for a judgment that it and not the homesteaders owned the former lake bed. This Court held that the homesteaders owned the bed.

The question was what effect the treaties, by which the Red Lakes ceded all but the one remaining section of land, had on the stream beds in that remaining section. If the treaties amounted to a pre-1858 recognition of the Indians' aboriginal ownership of the bed, then Minnesota did not take title to the bed in 1858, and the United States acquired the bed from the Red Lakes in 1889. This Court said (270 U.S. at 58-59):

> "There was nothing in this [the series of treaties ending in 1855] which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State."

This then was the state of the law when this Court decided *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970). In that case the Choctaw and other tribes had ceded their aboriginal lands east of the Mississippi, and the U.S. granted them new lands to the west, through which ran the Arkansas River, a navigable stream. Many years later, the tribes agreed to allot their lands to their members, and to terminate tribal affairs. Oklahoma then became a state. Since the reservations had been terminated, Oklahoma assumed it owned the streambed of the Arkansas, and for many years it received income from mineral leases therein.

In 1966 the Indians claimed ownership of the Arkansas bed. This Court agreed. This Court reaffirmed the *Shively* rule that the United States can dispose of

lands underlying navigable waters, and held that the question was whether the United States intended to do so when it granted the reservations to the tribes. 397 U.S. at 633. This Court held that this was indeed the intent, based on the following factors:

a. Part of the river was surrounded on both sides by the land granted to the Indians. 397 U.S. at 628.

b. There was no explicit exclusion of the bed. *Id.*

c. The Indians did not seek out the U.S.; the treaties were imposed upon them. *Id.* at 630-31.

d. The Indians were promised "virtually complete sovereignty" over their new lands. *Id.* at 635.

e. The Indians were promised that their new lands would never be embraced in any Territory or State. *Id.* at 635.

f. One of the calls dividing the land of one tribe from that of another was "down the main channel of the Arkansas river," implying ownership to the middle of the river. *Id.* at 631.

g. The well settled rule of construction is that treaties will be interpreted as the Indians would have understood them, and doubtful expressions will be resolved in their favor. *Id.* at 631.

h. *Holt State Bank* was distinguished on its facts, as not intending a grant of the bed. *Id.* at 634.

B. The Fort Laramie Treaties of 1851 and 1868 Were Recognitions of the Crow Tribe's Title to the Lands Described Therein, Including the Streambeds

1. *The Fort Laramie Treaty of 1851*

Initially, let us examine the negotiations leading to the Fort Laramie Treaty of 1851, 11 Stat. 749, Pet. App.

83-87. The circumstances as well as the documents surrounding these treaties are set forth in detail in the cases cited in footnote 1 above.

In summary, prior to 1851 costly wars had broken out between the various Indian tribes inhabiting the area, and it was dangerous for settlers trekking westward in search of gold. The government wished to establish peace among the tribes and to obtain safe passage across these lands for the settlers. To accomplish this end an appropriation was made by Congress on February 27, 1851 (9 Stat. 572), to defray expenses of a peace commission. Members of the peace commission were given instructions which included the following:[8]

> "It is important, if practicable, to establish for each tribe some fixed boundaries within which they should stipulate generally to reside, and each should agree not to intrude within the limits assigned to another Tribe without its consent."

Later that year, the tribes in the area gathered at Fort Laramie for the purpose of entering into negotiations with the government's commission. These tribes included the Crows, Sioux of the Missouri River Country, the Assiniboines, Gros Ventres, Mandans, Arickarees, Shoshones, Cheyennes and Arapahoes. The treaty was signed on September 17, 1851. With relation to the Crow, Article V of the Treaty provided:

> ". . . The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone, thence up the Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the headwaters of the Yellow-

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[8] Quoted in *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308, 312 (1930).

> stone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the headwaters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the headwaters of Big Dry Creek, and thence to its mouth.
>
> ". . . It is, however, understood that in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing or passing over any of the tracts of country heretofore described."

On the basis of all the circumstances, the Court of Claims in *Crow Tribe* v. *United States, supra*, concluded that the United States by the Fort Laramie Treaty of 1851 recognized title in the Crow Tribe to the lands described in that document. The court said:

> "It is true that the language of the Treaty is not the technical language of recognition of title. Nevertheless, we think that the participation of the United States in a treaty wherein the various Indian tribes describe and recognize each others' territories is, under the circumstances surrounding this treaty, and in light of one of the overriding purposes to be served by the treaty, i.e. securing a free passage for emigrants across the Indians' lands by making particular tribes responsible for the maintenance of order in their particular areas, a recognition by the United States of the Indians' title to the areas for which they are to be held responsible, and which are described as 'their respective territories.'" 284 F.2d at 364.

Also, speeches given at the negotiations by the peace commissioners contained ample reference to the territories as "your country", "your land" and "your territory" to

assure the Indians of their ownership of that area.[9] Similar references were contained in the internal governmental communications on this issue.[10]

It is noteworthy that the *Crow Tribe* decision initially described two methods by which title to Indian lands could be shown. First, the Crow Tribe could show that it had Indian title to the lands, i.e. that it used and occupied the lands from time immemorial.[11] As an alternative, the Crow Tribe could show that the government *recognized* title to the land.[12] The Court in *Crow Tribe*

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[9] *Crow Tribe*, 284 F.2d at 366-67, quoting from an address by Treaty Commissioner Mitchell held at the initial meeting with the Tribes on September 8, 1851.

[10] Letter from Commissioner of Indian Affairs, W. Medill, to the Secretary of Interior, June 15, 1849, quoted in *Crow Tribe*, 284 F.2d at 365. 1849 Report to Secretary of Interior from Commissioner of Indian Affairs, quoted in *Crow Tribe* at p. 366; *cf.* letter from Commissioner of Indian Affairs to Treaty Commissioner Mitchell, May 26, 1851, S. Doc. No. 53, 70th Congress, 1st Sess. (1851), 4 Kapp. 1074-75.

[11] Mere unrecognized Indian title is not compensable when taken by the United States. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 106 n.28 (1949); but it may be sufficient to protect from trespass by outsiders, see *United States ex rel. Hualapai Indians* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941).

[12] "By 'recognition' the Courts have meant that Congress intended to acknowledge, or if one prefers, to grant, to Indian tribes rights in land which were in addition to the Indians' traditional use in occupancy rights exercised only with the permission of the sovereign. Those additional rights may be sufficient to spell out fee simple title in the Indians if that is what Congress wished, or they may result in something less than fee simple title. The extent of those new and additional rights in the accompanying obligations of the sovereign and the tribe usually will be determined by Congressional enactment, the treaty, or the agreement, conferring them. Sometimes, as in the case of the Fort Laramie Treaty, it is necessary to look to the negotiations leading up to the treaty

concluded that the Tribe, by virtue of the circumstances surrounding the Treaty of 1851, made the latter showing.[13]

It is this issue of recognition or grant of title that best explains the distinction between the immediate case and the decision of this Court in *United States* v. *Holt State Bank, supra.* In that case, no evidence was found that Indian title to the lands given the Red Lake Band, including the lands underlying Mud Lake, had been recognized. The Court stated:

> "There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein nor any attempted exclusion of others from the use of navigable waters." [14]

2. *The Fort Laramie Treaty of 1868*

In 1867, the United States again approached the Crow Tribe for the purpose of reducing the territory recog-

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and the reports of the treaty commissioners to accurately determine the precise nature and extent of the rights and obligations created by the treaty." *Miami Tribe* v. *United States,* 175 F. Supp. 926, 940 (Ct. Cl. 1959).

[13] The 1851 Fort Laramie Treaty recognized title in the other signatory tribes, as well as the Crows. *Fort Berthold Indians* v. *United States,* 71 Ct. Cl. 308 (1930); *Assiniboine Tribe* v. *United States,* 77 Ct. Cl. 347 (1933), *app. dism.,* 292 U.S. 606; *Sioux Tribe* v. *United States,* 500 F.2d 458 (Ct. Cl. 1974).

[14] 270 U.S. at 58. The majority opinion in *Choctaw, supra,* 397 U.S. at 634, stated that the Court in *Holt* examined the circumstances of the creation of the reservation and concluded that no disposal of lands to the tribe took place. And in concurring, Justice Douglas distinguished *Holt State Bank* on the grounds that it only involved aboriginal title of use and occupancy. 397 U.S. at 639.

There are other factors that distinguish *Holt.* For example, a specific metes and bounds description for the Red Lake Band was not provided until 1863, 13 Stat. 667, after Minnesota was admitted to the Union in 1858, 11 Stat. 285. Not only that, but the Minnesota Enabling Act did not provide any disclaimer provisions.

nized in 1851 as belonging to the Tribe. A portion of the speech given by Commissioner Taylor to the Crow representatives on November 12, 1867, at the beginning of the negotiations for the Treaty, is particularly instructive:

> "We learn that valuable mines have been discovered in your country which in some instances are taken possession of by the whites. We learn that roads are laid out and travelled through your lands, that settlements have been made upon your lands, that your game is being driven away and is fast disappearing. We know also that the white people are rapidly increasing and are taking possession of and occupying all the valuable lands. Under the circumstances we are sent by the great Father and the Great Council in Washington to arrange some plan to relieve you, as far as possible, from the bad consequences of this state of things and to protect you from future difficulties.
>
> "We desire to *set apart a tract of your country as a home for yourselves and children forever*, upon which your great Father will not permit the white man to trespass. *We wish you to make out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest*, leaving to you however, the right to hunt upon it all as long as the game lasts." (Emphasis added) Proceedings of the Great Peace Commissions of 1867-1868 (1975), Appendix A below, pp. A1-A2.

In response, Blackfoot, one of the principal representatives for the Crow Tribe, spoke:

> "The Crows used to own all this Country including all the rivers of the West." Appendix A below, p. A5.
>
> "We are not very numerous, but are very strong and powerful. There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of

> beaver in all the streams. There is plenty of fish too. I never yet heard of any of the Crow Nation dying of starvation. I know that the game is fast decreasing and whenever it gets scarce, I will tell my Great Father. That will be time enough to go farming." *Id.* p. A11.

The conclusion is inescapable that the United States intended to recognize full title to the property within the metes and bounds description in the Crows, and the Crows understood this. It is also clear from the above remarks of Blackfoot that the Crows expected to continue hunting, but eventually to take up farming. He clearly expressed the availability of fish and beavers within those area designated to the Crow, as a continued source for food, so long as it lasted.

The actual language of the Treaty bears out the assurance given by Commissioner Taylor that the lands will be:

> "[S]et apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them . . ." Article II, Pet. App. 89.

Thus, the negotiations leading to this Treaty as well as its express language considered against the background of the Fort Laramie Treaty of 1851 reaffirms the intent of the United States to grant these lands including the beds of the Big Horn River to the Crow Tribe.

In addition, it is helpful to examine further documents that occurred after the signing of the treaty. In a letter dated May 20, 1868, to O. H. Browning, Secretary of the Interior, from the President pro tem of the Indian

Peace Commission, John Sanborn (who negotiated the Treaty of 1868 with the Crow), Mr. Sanborn stresses that the main purpose of the treaty was to establish peace and attempt to civilize the tribes and that these goals superseded the consideration of what property was actually being given up by the Indians:

> "But, if the value of the possessions ceded is to be considered, then, for stronger reasons, the government should not hesitate to have the treaties ratified and executed: mineral lands of exhaustless wealth and inconceivable value, extending over thousands of square miles, navigable streams, rivers of hundreds of miles in extent, on the banks of some of which, (the Muscle Shell), our capitalists have already invested more than a million dollars in mines of copper, that promise to exceed in richness any that have ever before been discovered; large agricultural tracts, the finest on the eastern slopes of the mountains, are a portion of what these tribes have ceded by this treaty." Appendix B below, p. B2.

The writer of this letter in describing the land not included in the treaty emphasized the extent of the acreage to which all claim was relinquished. It is noteworthy that the writer specifically describes navigable streams and rivers outside the boundaries as being ceded. This lends strong support to the principle that the rivers and title to the beds beneath them within the area reserved, including the Big Horn River, were not granted away by the tribes but rather reserved by them. *Winans*, *supra*, 198 U.S. at 381.

3. *The 1873 Unratified Agreement*

In 1873, five years after the 1868 cession, the United States negotiated another cession from the Crows. A transcript of minutes of the Agreement of August 16,

1873, appears in the record.[15] Although the 1873 Agreement was never ratified by Congress,[16] nevertheless some portions of the negotiations reveal the thinking of the parties in 1873, and by inference, their thinking in 1868.

The 1873 negotiations came about because the United States wished to obtain a cession of a part of the Crows' 1868 territory which had been (illegally) occupied by miners and prospectors.[17] One theme that appears throughout the 1873 negotiations is that the United States recognized that the Crows' 1868 territory belonged to them absolutely.[18] Another theme was that the Indians were concerned about hunting game, and that the game was diminishing.[19] Congress instructed the U.S. negotiators to try to arrange for a diminished reservation for the Crows,

> "and if there is upon said reservation a locality where fishing could be valuable to the Indians, to

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[15] The Agreement appears at J. App. II, 111-115, see also 4 Kappler 1142; certain related documents appear at J. App. II, 96-111; the minutes appear at J. App. II, 121-128, and J. App. II, 129-185.

[16] See 4 Kapp. 1142; Royce, *Indian Land Cessions* 864 (1900).

[17] J. App. II, 99, 100, 108, 131.

[18] U.S. Commissioner Brunot: "That [the 1868 reservation] is the country that belongs to you forever, or until you wish to sell it." J. App. III, 131, see also 139, 141, 145, 151, 165, 166.

[19] Indian leader Blackfoot: "On the other side of the river below, there are plenty of buffalo; on the mountains are plenty of elk and black-tailed deer; and white-tail deer are plenty, at the foot of the mountain. All the streams are full of beaver. In the Yellowstone River the whites catch trout; there are plenty of them." J. App. III, 137. U.S. negotiator Brunot: "The buffalo used to be on the Platte, as they are now on the Big Horn and Powder River. . . . Buffalo are the Indians' bread, but they are going away, and soon will be all gone . . . ." *Id.* 149.

include the same if practicable . . . ." J. App. III, 175.

Understandably, nothing was said about streambeds, but the tenor of the dialogue suggests that both sides would have been astonished to hear it suggested that the beds within the 1868 reservation did not belong to the Indians in the same sense as the rest of the land. When the treaty negotiations opened with the Crow on August 11, 1873, Mr. Brunot, the principal negotiator for the government, described the land the Crow received as a result of the 1868 Treaty.

> "That treaty says where the Crow land is to be. I think it is a good country. It is along this river [Yellowstone] about seventy-five miles above the agency, and then goes toward where the sun rises *until it crosses the Big Horn*, and goes halfway between it and the mouth of the Rose-bud River, about twelve miles this side of Porcupine Creek. This is what the treaty and the map say. That is the country that belongs to you forever, or until you wish to sell it." J. App. III, 131 (emphasis added).

In the response Blackfoot, the principal speaker for the Crow, said:

> "The Great Spirit made these mountains and rivers for us, and all this land." *Id.* at 136.
>
> Brunot: "It is your land; you can do as you please with it." *Id.* at 141.
>
> Brunot: "You have this reservation . . . . It belongs to you, and you can do as you please about it." *Id.* at 165.
>
> Blackfoot: *"On the other side of the river all those streams belong to the Crows."* *Id.* at 171 (emphasis added).

There is no question but that Blackfoot and the Crows understood that the country described by the 1868 Treaty was recognized as theirs and that it included everything within the boundaries stated—the rivers, the mountains, the streams, and their banks and beds. The United States representatives understood the same. There was a tacit meeting of the minds.

C. Subsequent Legislation Confirmed in the Tribe Its Title to the Bed of the Big Horn River

Initially, it should be stated that in the Fort Laramie Treaty of 1868, the boundary is described as passing up the mid-channels of a river such as "thence north along said 107th meridian to the mid-channel of the Yellowstone River," 15 Stat. 649, Article II, Pet. App. 89. While the Petitioners and their amici make attempts to disregard this particular reference, the implications present from the description with regard to the ownership of riverbeds is unavoidable. This method of describing the mid-channel of the river as a boundary continues through the ceding of lands of the reservation in the Act of April 11, 1882, J. App. II, 44; the grant of a right-of-way to the Northern Pacific on July 10, 1882, 22 Stat. 157; and the ceding of reservation lands in the Act of March 3, 1891, 26 Stat. 989, 1040. Particularly noteworthy is the 1891 Act, which ceded an area of land which lies in part beyond the midline of the Big Horn River. This description reads in part:

> "Then due south and up the north slope of said Prior Mountain on a true meridian line to a point fifteen miles due north from the established line between Montana and Wyoming; thence in a due easterly course on a parallel of latitude to a point whence it intersects the mid-channel of the Big Horn River, thence following *up the mid-channel of said river* to a point where it crosses the Montana and Wyoming state line." (Emphasis added)

The *Choctaw* case regards such a boundary designation running through the midline of the channel of the river in question as a clear indication that the Congress intended to convey a part of the riverbed (on the other side of the channel midline) but to retain the remainder of the riverbed within the reservation. *Choctaw Nation*, 397 U.S. at 633. It certainly seems beyond doubt that Congress intended to include the bed of the Big Horn River within the Reservation because it expressly carried the edge of the Reservation to the midline of the bed of the Big Horn River in the Act of March 3, 1891. Certainly the language in Article II of the 1868 Treaty describing the Crow boundary up to the mid-channel of the Yellowstone is direct proof that Congress intended to grant the bed of the Yellowstone to the Tribe out to the mid-channel there, and indirect proof that Congress intended to grant the full extent of the bed to the Tribe in locations where the stream lay (as in the case of the Big Horn) entirely within the reservation boundaries.

Also, it is not without significance that after the Tribe's title was recognized in 1851, the Organic Act for the Territory of Montana (1864) disclaimed any territory belonging to an Indian tribe in the following language:

> "Provided further, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights remain unextinguished by treaty between the United States and such Indians . . . ." Act of May 26, 1864, 13 Stat. 85, J. App. II, 30-31.

Similar language disclaiming right and title to Indian lands was present in the Montana Enabling Act, Act of February 22, 1889, 25 Stat. 676: [20]

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[20] Besides Montana, the states of Washington, North Dakota and South Dakota were allowed entry into the Union. Identical language may also be found in the Enabling Acts covering Utah, 28 Stat. 107, 108; Oklahoma, 34 Stat. 267; New Mexico and Arizona, 36 Stat. 557.

> "The people inhabiting said proposed states do agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by an Indian or Indian tribes." [21]

Thus the impact of this subsequent legislation would be to confirm title of the riverbed of the Big Horn River in the Crow Tribe. Notwithstanding, Petitioners in their brief, pp. 25-27, and Amicus State of Washington, contend that the Crow Allotment Act of 1920, 41 Stat. 751, confirms Montana's ownership to the riverbed by allowing non-Indian ownership of trust land. In support of this argument, Amicus cite no legal authority other than a footnote in the decision by this Court in *Puyallup Tribe* v. *Washington Game Dept.*, 433 U.S. 165, 174 n.12 (1977). There this Court took the position that in view of the fact that only 22 acres of the Puyallup Reservation were still retained in trust ownership and that none of this acreage abutted the river, an argument that the riverbed was in trust status would be at odds with the uncontradicted findings of the court below.

Initially, it must be emphasized that the issue of the ownership of the riverbed of the Puyallup River was not before the Court. Also, in view of the above arguments concerning the intent of Congress and the exhaustive analysis which this Court itself has applied to the question of whether a treaty or statute has granted or recognized title to Indian land, it is without foundation to suggest that this footnote disposes of the issue in this case. Indeed in footnote 11 of the same opinion, 433 U.S. at 173, there is a question raised as to the continued existence of the Puyallup Reservation. However, this reference also lacks any detailed analysis of the statutes in question which would show how title was divested.

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[21] Also, the proceedings of the Constitutional Convention for Montana in 1880 contain many references disclaiming title to Indian lands. See Crow Tribe Exhibit 11, J. App. II, 49-54.

In the present case the Crow Reservation is indisputably in existence. Furthermore, the sale of reservation land to non-Indians is completely consistent with continued reservation status. *Mattz* v. *Arnett*, 412 U.S. 481, 497 (1973). This is especially true as to sales by individual Indians, as here, as opposed to sales directly under a congressionally approved program, as in *Mattz*.

An examination of the Crow Allotment Act does not bear out Petitioners' contentions. In fact, Section 10 of that Act, Pet. App. 105, 112, leads to a contrary conclusion. There it is stated:

> "That any unallotted lands on the Crow Reservation chiefly valuable for the development of water power shall be reserved from allotment or other disposition hereunder, for the benefit of the Crow Tribe of Indians."

There is no doubt that the riverbed of the Big Horn River falls within the above definition. Certain lands underlying the Big Horn River have already been condemned for use in a dam project. In the litigation awarding compensation for the taking, the District Court concluded that compensation should be given for water power value pursuant to the meaning of the above section of the 1920 Act. *United States* v. *5,677.94 Acres of Land*, 162 F. Supp. 108 (D. Mont. 1958).

The remaining portion of the riverbed in question in this suit certainly has water power potential. As recently as July 9, 1980, the United States Department of Energy awarded a grant to the Crow Indian Tribe to study the feasibility of a synthetic fuels plan which would utilize water from the Big Horn River in conjunction with the development of the Tribe's resources. Therefore, under this section above, it is clear that the riverbed would remain unallotted. Thus, this contention by the Petitioners must fail.

D. Summary and Analysis

Following the *Choctaw* analysis (page 14 above), it would seem difficult to conclude that the United States intended to withhold recognition of the streambeds within the Crows' unceded reservation, so as in effect to reserve them for whatever future state was organized there. With respect to the 1851 Treaty:

1. As in *Choctaw*, the tract recognized as the Crows' surrounded the Big Horn River (and other streams) on both sides.

2. The Crows had owned this land since before the white man came. The Choctaws, on the other hand, had not previously owned the land in question.

3. As in *Choctaw*, there was no explicit exclusion of the bed in the treaty.

4. As in *Choctaw*, the treaty was for the benefit of the United States, not the Crows.

5. Treaties are to be construed as the Indians would have understood them.

The 1868 Treaty made the Crows' claim to the streambeds even stronger. The following factors were added to the foregoing ones:

6. The Crows were promised that no whites would be allowed in the new, diminished reservation, and it was implied that the Tribe would have self-government undisturbed by any future state. This is comparable to the promise to the Choctaws that their new land would never be within any state.

7. When Montana became a Territory in 1864, Congress provided that nothing in the Territorial Act would impair any Indian rights "so long as

such rights shall remain unextinguished by treaty . . . ." The Crow title to the streambeds in the 1851 Reservation was not extinguished by treaty by 1864.

8. When Montana became a state in 1889, it was required to disclaim all right and title to lands owned by Indians "until the title thereto shall have been extinguished . . ." The Crow title to the streambeds in its present Reservation has never been extinguished.

9. One of the calls of the 1868 Treaty was "down the middle of the Yellowstone," showing intent that the near half of the river remain within the Reservation.

In the face of these factors it cannot fairly be concluded that the Crows do not own the streambeds within their present reservation.[22]

II. THE CROW TRIBE OWNS THE STREAMBED TO THE HIGH WATER MARK

The State argues (Pet. Br. 27-29) that the riparian owners on the Reservation own the upland down to low water mark, because that is the Montana rule when the stream is navigable. The court below rejected this on

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[22] Apparently the Montana Supreme Court would agree. See *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629, 635 (1954), where it held that the Flathead reservation lands "were not held by the United States for the state [of Montana] upon its admission. Compare: United States v. Stotts, D.C., 49 F.2d 619. . . ." The *Stotts* case, see note 7 above, held that the Lummi Tribe owned tidelands adjacent to its reservation despite the usual rule that the U.S. holds tidelands for the future state.

Even the trial court below agreed initially. On Sept. 4, 1974, after briefing, the trial court held: "Considering *Choctaw Nation*, the treaties involved in this case, and the nature of the Crow Tribe's title, the conclusion is inescapable that the river bed of the portion of the Big Horn River in question belongs to the Crow Tribe."

the grounds that the federal rule should apply, not the state rule. Pet. App. 24-26.

It seems to us that the answer depends entirely on whether the Tribe owns the streambed, for if it does, then it owns up to high water, because it still owns all but what was allotted, and the allotments only went down to the high water mark.[23] Obviously, if the Tribe owns the banks, then they cannot pass by state law to the non-Indian who buys a riparian allotment.

If on the other hand the State owns the streambed, as it claims under the equal footing doctrine, then likewise *it* owns to the high water mark, and can by operation of state law convey the bank to the non-Indian who buys a riparian allotment.

III. THE CROW TRIBE MAY REGULATE HUNTING WITHIN THE BOUNDARIES OF THE CROW RESERVATION

If the Court concludes that the Tribe owns the bed of the Big Horn River, the question of power to regulate or prohibit fishing (and bird hunting over the river) is disposed of. Obviously, the Tribe, as owner of the streambed, can prohibit outsiders from hunting or fishing on tribal land, or can allow it on such terms as the Tribe pleases. *United States* v. *Pollmann*, 364 F. Supp. 995 (D. Mont. 1973); see *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918).

However, this still leaves open the question whether the Tribe may prohibit or regulate hunting on non-Indian land within the reservation. We submit that as to this question (and as to fishing also if the Tribe does

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[23] *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894). The tribe owned to high water mark in *Donnelly* v. *United States*, *supra*, 228 U.S. at 252; see also *Montana Power Co.* v. *Rochester*, 127 F.2d 189, 191 (9th Cir. 1942).

not own the Big Horn bed), the Tribe has an exclusive right, in the nature of a profit a prendre, to hunt (and fish) throughout the reservation, regardless of whether the locus is on trust or fee land. As owner of this exclusive right, it may prohibit anyone from sharing in the right, or may permit it on such terms as it pleases. This argument is presented in Section A below.

But if this Court should conclude that the Tribe does not own the exclusive right to hunt (and fish) on the reservation, then the Court will reach our alternative argument, which is that the Tribe has the sovereign power to regulate hunting (and fishing) anywhere within the reservation, and may for the sake of conservation entirely prohibit hunting (or fishing), at least by persons who do not live on the reservation. This argument is presented in Section B below.

A. Hunting or Fishing Anywhere Within the Reservation Without Tribal Permission is an Infringement of the Tribe's Exclusive Right to Hunt and Fish

At the time of the making of the Fort Laramie treaties of 1851 and 1868, the U.S. knew that hunting and fishing were relied upon by the Crow Indians as a means of sustenance. Pet. App. 32, and see p. 20 above. The 1851 Treaty expressly guaranteed the Tribe's right to hunt and fish anywhere within the entire Fort Laramie territory.[24]

During the negotiations leading to the 1868 Treaty of Fort Laramie, Blackfoot, one of the chief spokesmen for

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[24] Pet. App. 86 (the signatory tribes "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described"). See *Mescalero Apache Tribe* v. *New Mexico*, —— F.2d —— (10th Cir. Aug. 13, 1980) ("The Tribe's inherent authority [to regulate fish and game] stems largely from the traditional reliance on wild game for basic survival needs." Slip Opn. 10.)

the Crows, spoke of the Tribe's intention to rely for its livelihood on the fish and game in Crow Country:

> "We are not very numerous or very strong and powerful. There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of beaver in all the streams. There is plenty of fish, too. I never yet heard of any of the Crow nation dying of starvation. I know that the game is fast decreasing and whenever it gets scarce I will tell my Great Father. That will be time enough to go farming. . . ." [25]

Article II of the Fort Laramie Treaty of 1868, Pet. App. 88-89, set aside the property described in the Treaty for the "absolute and undisturbed use and occupation of the Indian." It also provided that no persons other than those authorized by the Crow Tribe and with certain other exceptions not relevant here "shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians." Article IV of the Treaty, Pet. App. 90, provided that the Crows would make the reservation their permanent home and would not make a settlement elsewhere.

These circumstances, we submit, create in the Tribe an exclusive right to take game on the reservation, a right that exists throughout the reservation separate and apart from the ownership of the underlying land; and while this right may be diluted to the extent that one who lives on reservation fee land may also hunt on it (as the court below held and the Tribe does not question

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[25] Appendix A below, p. A-11. This concept was expressed throughout the negotiations held in 1873 between the Government and the Crow Tribe. Crow Tribal Exhibit 74, J. App. II, 93-128, and III, 129-185, also 136-137, 149-154. The preservation of game and fish for the sustenance of the Tribe has been expressed over the years since the time of the treaty. See Pl. Exs. 6, 18, C.T. Ex. 71-g.

here), it may not be diluted to the extent of permitting nonresidents to come on the reservation to hunt.

In *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629 (1954), a Flathead Indian killed an antelope out of season on fee land on the reservation, and the State convicted him of violating the State season law. In voiding the conviction the Montana Supreme Court had this to say:

> "The exclusive right to hunt and fish, under the treaty, on all of the lands within the exterior boundaries of the Flathead Indian Reservation was not granted by the United States but was reserved by the Indians. It is a right held in common by each Indian of the tribes signatory to the agreement. *This right is a servitude and easement, an interest in the land, which the Indians have never alienated and which interest and right the United States or the state never owned or acquired and therefore could not convey. No patent issued by the government, either federal or state, conveyed this right and interest.*
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> * * * *
>
> "The exclusive right, acknowledged by the treaty, of hunting and fishing in and upon the lands and waters within the exterior boundaries of the Flathead Indian Reservation, imposed a servitude and easement upon every piece of land therein as though specifically described. The future ownership of the lands thereof was well foreseen and provided for.
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> "The Indians retained a right in the land, the right of hunting thereon. *The right was intended to be a continuing one against the United States and its grantees as well as against the state and its grantees.* No other conclusion would give effect to the treaty. Compare United States v. Winans, supra. It is our opinion that *the rights reserved of hunting and fishing upon any and all lands and waters within the exterior boundaries of the Flathead Indian Reservation, by the treaty of July 16, 1855, 12 Stat.*

> *975*, have never been alienated, still exist unimpaired and that as far as the state laws are concerned, the Indian tribes bound by the treaty are entitled to hunt and fish therein at any time." 268 P.2d at 635 (emphasis added).

That the Tribe may own the right even though its land has been conveyed to non-Indians is shown by the off-reservation hunting and fishing rights cases, see especially *United States* v. *Winans*, 198 U.S. 371 (1905). To be sure, the Indians' right there was not exclusive, but it was sufficient to cause the landowner to restrict his fishing. See also *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (Indians entitled to 50% share, and non-Indians must limit their fishing to permit the Indians to take their share).

Even the termination of a reservation does not terminate the implied hunting and fishing rights that arose within the reservation when it was created. See *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. den.*, 419 U.S. 1019.

We believe the correct concept was expressed by *Mason* v. *Sams*, 5 F.2d 255, 258 (W.D. Wash. 1925):

> "There is no analogy in this matter between the power of the government, and the authority of the state over the fish in its streams. The state owns the fish and the game of the state, and may regulate or license the right to take them, or forbid it entirely. *But the fish in the waters of this stream do not belong to the state, nor to the United States; but to the Indians of this reservation.*" (Emphasis added).

The exclusive right is owned by the Tribe, not by its members,[26] and therefore cannot be alienated by the members.

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[26] "Whatever title [to tribal property] the Indians have is . . . held by the tribe for the common use and equal benefit of all the

B. The Crow Tribe Has Civil Jurisdiction to Regulate Hunting and Fishing by Non-Indians Anywhere Within the Reservation

That non-Indians on the reservation are subject to tribal hunting and fishing regulations, at least where the status of the land was Indian-owned, or was not in issue, has been seen in many cases.[27] The instant case is the first to involve the question whether tribal hunting and fishing regulations specifically apply to fee land on the reservation.

The Petitioners take the position that the Crow Tribe does not have inherent sovereignty to regulate hunting activity on non-Indian fee lands. Pet. Br. 34. While the decision in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), makes clear that tribes do not have *criminal* jurisdiction over non-Indians,[28] it has been consistently recognized that tribes have at least some *civil* jurisdiction over non-Indians on the reservation.

In *Worcester* v. *Georgia*, 31 U.S. 515, 559 (1832), Chief Justice Marshall stated:

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members." *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307 (1902); see also *Whitefoot* v. *United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (fishing rights owned by tribe, not members); Hobbs, *Indian Hunting & Fishing Rights*, 32 Geo.Wash. L.Rev. 504, 515-16 (1964).

[27] See, e.g., *Quechan Tribe* v. *Rowe*, 531 F.2d 408 (9th Cir. 1976); *United States* v. *Pollman*, 364 F. Supp. 995 (D. Mont. 1973). See also *Mescalero Apache Tribe* v. *New Mexico*, —— F.2d —— (10th Cir. Aug. 13, 1980); *Eastern Band of Cherokee Indians* v. *North Carolina Wildlife Comm.*, 588 F.2d 75 (4th Cir. 1978), pet. cert. dism. by stipulation, —— U.S. —— (May 22, 1980).

[28] However, a tribe may have authority to arrest a non-Indian for violation of federal or state law, and promptly turn him over to the federal or state authorities. See *Ortiz-Barraza* v. *United States*, 512 F.2d 1176 (9th Cir. 1975), and *Quechan Tribe* v. *Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).

> "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power . . . ." *Id.* at 559.

And, Indian tribes are—

> ". . . distinct political communities, having territorial boundaries, within which their authority is exclusive . . . ." *Id.* at 557.

In his authoritative *Handbook of Federal Indian Law*, Felix Cohen summarized the judicially recognized background:

> "The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government." [29]

A necessary part of (in Cohen's words) the "full powers of internal sovereignty" is the power to regulate everyone within the reservation, Indians and non-Indians alike, within the limits imposed by Congress. In 1934 the Solicitor of the Interior Department declared: [30]

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[29] Cohen, *Handbook of Federal Indian Law*, (G.P.O. 1942) at 123 (hereinafter *Cohen*). Also quoted in Department of the Interior, *Federal Indian Law* (1958) at 398.

[30] *Powers of Indian Tribes*, 55 I.D. 14 (1934). Excerpts from it appear in *Cohen*, at 122.

> ". . . [O]*ver all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders,* the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority." 55 I.D. at 50 (emphasis added).

In 1976, the Associate Solicitor for Indian Affairs (the top attorney for Indian matters in the Interior Department) clarified the position of the Department and left no doubt that the position of the government was that the Tribe had regulatory authority over non-Indian hunting and fishing on the reservation. J. App. II, 3-8. The same year, the Solicitor of the Interior Department issued a detailed, unpublished opinion, dated Oct. 13, 1976 (which the Confederated Colville Tribes et al., as amici curiae, have lodged with the Clerk of this Court), concluding that the Shoshone-Bannock Tribe can zone fee land on its reservation. The recent *Knight* case has agreed, see note 32 below.

These authoritative rulings by the federal agency responsible for supervision of Indian affairs directly refute the Petitioners' argument that purchase of fee land takes that land out of the Tribe's power to control hunting and fishing.

Similarly, the Attorney General of the United States has ruled that:

> "[T]he legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation . . . . [T]hese nations [are fully authorized] to absolutely exclude outsiders or to permit their residence or business upon such terms as they may choose to impose. . . ." 23 Ops. Atty. Gen. 214, 217 (1900).

In *Quechan Tribe* v. *Rowe*, 531 F.2d 408, 411 (9th Cir. 1976), the court held:

> ". . . [T]he Quechan Tribe may exercise several types of authority over non-members who enter the reservation to hunt or fish. These are: the rights to determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; to expel those who enter the reservation without proper authority or those who violate tribal, state or federal laws; to refer those who violate state or federal laws to state or federal officials; and to designate officials responsible for effectuating the foregoing." [31]

In *Williams* v. *Lee*, 358 U.S. 217 (1959), the Court considered the question whether a non-Indian could sue an Indian in state court on a debt arising on the reservation. This Court said no:

> "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. . . ." 358 U.S. at 220.

This Court concluded:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence *would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.*" *Id.* at 223 (emphasis added).

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[31] The court might have added another remedy: to seek injunction or damages in federal or state court. This Court is well aware of the enforcement of Indian fishing rights through comprehensive court orders seen in *Washington* v. *Fishing Vessel Assn.*, 443 U.S. 658, 673 (1979). Yet another device, sometimes used, is cross-deputization of tribal officers so that they can enforce federal or state criminal law.

In *McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 164 (1973), this Court clarified the proper application of the *Williams* infringement test:

> "It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. . . . In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdiction. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." 411 U.S. at 179.

In the case at bar, the Court (if it rules against the Tribe on the streambed and exclusivity points) faces the problem that the *Williams* test was designed to resolve: if the Crow Tribe, acting through its elected governing body, desires to prohibit all hunting and fishing on the reservation, it would be a gross infringement of tribal self-government for the State to permit non-Indians to ignore the tribal prohibition. Therefore, under *Williams*, the tribal prohibition takes precedence.

This Court in *Oliphant* questioned none of these authorities; it referred only to a tribe's *criminal* power over non-Indians. The significance of *Oliphant* is that while a tribe may lose sovereign power by express abrogation by treaty or Congressional enactment, it may also lose some sovereign power by the mere act of becoming dependent on the federal government. However, this is not a total loss of sovereignty; the *Oliphant* Court said:

> "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government." 435 U.S. at 208.

Indeed this principle of retained sovereignty was more clearly recognized in *United States* v. *Wheeler*, 435 U.S. 313 (1978). In that case, this Court discussed a tribe's sovereignty over its own members.

> "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' *United States* v. *Kagama* [118 U.S. 375, 381 (1886)]. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.
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> "*But our cases recognize that the Indian tribes have not given up their full sovereignty.* We have recently said 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . [They] are a good deal more than "private voluntary organizations."' " [32]

Furthermore, the concept of tribal sovereignty espoused in *Wheeler* was reaffirmed in *Washington* v. *Confederated Colville Tribes*, 48 U.S.L.W. 4668 (June 10, 1980), where the Court upheld a tribal cigarette tax on non-Indians:

> "The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power. Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which

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[32] 435 U.S. at 323, emphasis added. This Court cited *United States* v. *Mazurie*, 419 U.S. 544 (1975), where this Court affirmed a tribe's authority to regulate a commercial liquor enterprise operated by non-Indians and located on fee land within the boundaries of the Wind River Reservation. See also *White Mountain Apache Tribe* v. *Bracker*, 48 U.S.L.W. 4897, 4899 (June 27, 1980).

A recent case, also arising on the Wind River Reservation, has held in a carefully reasoned opinion that the Tribe has the inherent power to zone non-Indian fee land in a predominantly Indian community on the reservation. *Shoshone and Arapahoe Tribes* v. *Knight*, —— F.Supp. —— (D. Wyo. June 27, 1980).

the tribes have a significant interest. 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855), including jurisdiction to tax. 23 Op. Atty. Gen. 214 (1900); *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934).

"Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity. *Buster* v. *Wright*, 135 F. 947, 950 (CA8 1905), *appeal dismissed*, 203 U.S. 599 (1906); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (CA8 1956); cf. *Morris* v. *Hitchcock*, 194 U.S. 384, 393 (1904). No federal statute cited to us shows any congressional departure from this view. To the contrary, authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476. In these respects the present cases differ sharply from *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians.

"Tribal powers are not implicitly divested by virture of the Tribe's dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government as when the Tribe seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. See *id.*, at 208-210; *United States* v. *Wheeler*, *supra*, at 326. In the present case, we can see no overriding federal interest that would necessarily be frustrated by tribal taxation. And even if the State's interests were implicated by the tribal

> taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on and subordinate to only the Federal Government, not the States." [33]

As the above words imply, inherent sovereignty to regulate must extend to the activities of the non-member within the reservation boundaries. This certainly appears to be the implication of *Colville* where this Court recognized inherent sovereignty and said that it could be divested only when found to be inconsistent with the overriding interests of the National Government.

Such is certainly not the case here where the Tribe, for conservation purposes, attempts to bar non-residents from hunting and fishing on the reservation. The treaty right to hunt and fish, based on an express provision in a treaty (the 1851 Treaty), and accompanied by the understanding that the tract of land set forth in the treaty contained game and fish for the sustenance of the Indians, cannot be given a meaning that would render this right meaningless. Thus, the opinion below which allows tribal regulation to prohibit hunting and fishing within the bounds of the reservation to all but residents, is a proper balancing of treaty provisions made long ago with present day circumstances. There is no federal policy or statute that conflicts with this procedure and thus under the rule espoused by *Wheeler* and *Colville*, the Tribe would have the inherent authority to prohibit non-residents from hunting and fishing on the reservation.

Another reason for finding tribal jurisdiction is the "checkerboard" problem. The Tribe, as the local government of the Reservation, should have regulatory power over *all* land within the Reservation, including fee land. If tribal officers must "search tract books" to determine whether they have jurisdiction to enforce conservation

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[33] See also *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), upholding a tribal tax on non-Indian oil producers.

laws against non-Indians, enforcement will suffer. See *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478 (1976). The definition of "Indian country" in 18 U.S.C. § 1151 should be used to define the territorial jurisdiction of the Tribe.

> "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n. 2 (1975).

The *Knight* case, note 32 above, followed this principle in holding that the tribe had jurisdiction to zone fee land.

A very recent case, *Mescalero Apache Tribe* v. *New Mexico*, —— F.2d —— (10th Cir. Aug. 13, 1980), has held that "In regulating game on the reservation, the Tribe thus seeks to exercise its sovereign power in an area in which it unquestionably has a 'significant interest,' " citing the *Colville* case, *supra*. The court also was influenced by Public Law 280, 25 U.S.C. § 1321(b), which protects tribes subject to P.L. 280 from the deprivation of "any right . . . afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

IV. CROW TRIBAL RESOLUTION 74-05 NEITHER DEPRIVES NON-INDIANS OF FIFTH AMENDMENT GUARANTEES NOR DOES IT VIOLATE THE INDIAN CIVIL RIGHTS ACT

Neither the State nor its citizens have any claim that they have been denied equal footing protection or due process. The citizens of the State have no right to share the benefits of tribal fishing rights, unless the Tribe elects to grant permission to do so. The first opinion of the court below so holds. Pet. App. 81-82.[34]

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[34] In any case, the issue was disposed of by this Court in *Washington* v. *Fishing Vessel Assn.*, 443 U.S. 658, 673 n. 20 (1979).

V. THE COURT BELOW DID NOT ACT CONTRARY TO F.R.CIV.P. 52(a) IN REVIEWING THE DISTRICT COURT'S FINDINGS

Petitioners (Pet. Br. 41-42) do not indicate which findings of the trial court were set aside by the court below. Presumably (in view of the great attention it gave the matter at trial) Petitioners have reference to the trial court's finding that the Crow Tribe was largely dependent upon big game animals or agriculture for subsistence; and that fish was not a central part of the Crow diet. Pet. App. 32. But the Tribe does not contest these findings, and the appellate court did not say anything inconsistent with them.[35] Petitioners perhaps believe the Tribe must prove it subsisted mostly on fish in order to have fishing rights on its reservation. This is not the law.

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[35] The appellate court said, consistent with the trial court's findings, "At the time of the treaties the Crows were primarily hunters of buffalo and elk . . . ." Pet. App. 11.

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted,

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Of Counsel

September 26, 1980

Appendices

APPENDIX A

PROCEEDINGS OF THE COUNCIL WITH THE CROW INDIANS *

Fort Laramie, Dakotah Territory
November 12th, 1867

At ten o'clock a.m. on Tuesday, the 12th inst, the Commission met the Crows in Council, the proceedings of which were opened by Commissioner Taylor as follows:

COMMISSIONER TAYLOR

My friends! Chiefs, Headmen and Warriors of the Crow Nation. Of one blood the great Spirit made all people. We are therefore brethren. At our invitation you have come a long way, through much difficulty, to meet us. We have travelled a great distance to see you and to take you by the hand as friends and brothers. Your great Father at Washington, though so far away from you, is well informed of your friendship towards us. He knows also of the many proofs of faithfulness you have given to the government in past times. He knows also of some of the difficulties and troubles that surround you. He has sent us to see you in order that he may learn more fully, from your own lips, your true situation, and that he may take all necessary steps to remove those difficulties, and to make your way smooth for the future.

We learn that valuable mines have been discovered in your country which in some instances are taken possession of by the whites. We learn that roads are laid out and travelled through your land, that settlements

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* Published by Institute for Development of Indian Law, Wash. D.C., 1975, pp. 86-91.

have been made upon your lands, that your game is being driven away and is fast disappearing. We know also that the white people are rapidly increasing and are taking possession of and occupying all the valuable lands. Under these circumstances we are sent by the great Father and the Great Council in Washington to arrange some plan to relieve you, as far as possible, from the bad consequences of this state of things and to protect you from future difficulties.

We desire to set apart a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass. We wish you to make out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest, leaving to you however, the right to hunt upon it as long as the game lasts. Upon the reservations you select, we propose to build a house for your agent to live on, to build a mill to saw your timber, and a mill to grind your wheat and corn, when you raise any; a blacksmith shop and a house for your farmer, and such other buildings as may be necessary. We also propose to furnish to you homes and cattle, to enable you to begin to raise a supply or stock with which to support your families when the game was disappeared. We desire also to supply you with clothing to make you comfortable and all necessary farming implements so that you can make your living by farming. We will send you teachers for your children. Our hearts are glad to see you and you shall not leave us empty handed. There are presents for you on the road which we expect here every day. They ought to be here now. We will show our friendship by our acts. We wish to hear from you everything you have to say. We will consider it well and answer you in a friendly spirit.

A-3

BEAR'S TOOTH

I have come a long way to see you. I am very poor. My horses are all tired. In coming it was very cold. We had no wood to make any fires. (Turning to General Harney.) *You are now getting old. The weather is cold, so I will give you my robe, and place it on your shoulders.*

Last spring, I came to the Garrison on the Big Horn. They told me that the Great Father was calling for me. Our agent talked to me about coming here. I told him if my great Father would meet me at Phil Kearney, I would listen to him and agree to all he said. I was on the Yellowstone when the leaves were falling from the trees. Your messenger brought me ten plugs of tobacco from you. He told me that the Commission was not coming to Fort Phil Kearney and he told us to come here. Since I have come here I want you to do what I ask you. There is no wood, water, or buffalo this side of Phil Kearney. I was very hungry on the way. I have been waiting for you here a long while.

Look at me right. I am a person like you and have the same limbs and blood. I wish to live a long time and I want you to prosper us. I have plenty of children and I want them to live a long time. Your young men scare away the game and I have none left. I came to see you on this account. I want you to take pity on me and call back your young men from the country of the Big Horn. Your young men have destroyed the young grass and have set the country on fire. They kill the game, not because they want it. They leave it to rot on the roadside. Suppose I were to go into your country and destroy your cattle? But no, I would not do so. I have a good strong heart. The Sioux have given me a great many hundreds of horses and mules to join them in fighting you, but I have not done so, and I am still here shaking hands with you.

A long time ago you made a treaty with my nation, the Crows, and took one of us to Washington. He has been gone a long time and has not returned. We now want to get anything which he may have here. We are tired of waiting for him. You called for the Sioux the same as you did for us. You sent them tobacco. You sent them very little. You sent them packhorses. The Sioux told us to come and listen to you and then return and tell them what we had heard. They told us that you were going to fool us and not give us back our country and that you would play us the same trick you did them. They told us that if your words were good they would follow our tracks. In going back to my country, I expect to lose a great many horses. Take pity on me. I am not ashamed to talk to you. I am speaking from a full heart. The great Spirit made us all. We are surrounded by the whites. Take some of your heart and put it in with mine and try to make of me a good man. All my people, for a long time, have been friendly to the whites. Some time ago, a white Chief struck one of my people on the head with a revolver. On the Yellow Stone there were four white people. Four Indians, two of them Chiefs, went over and asked for bread. One of the whites pulled out a revolver and shot two of the Indians. One died. The whites have killed a brother of one of my young men, Wolf Bow, who went and joined the Blackfeet. We went and joined the Blackfeet. We looked over it and have never mentioned it until now.

If I were to kill you, we would all be killed by your people. There was a party of whites encamped near us one night when there was no fire or moon. We thought it was a war party of Sioux so we fired into it. We were sorry when we found it was a white camp. We are bad for doing so, but it was my young men. I went along the Missouri River to try and find some white Chief to whom I could tell of my bad doings in firing into that camp. I went to Fort Benton to beg pardon

of the Commander there, and to give him a great amount of robes and mules and horses for doing that bad act. I paid for my badness. When I found your young men on the Big Horn, I was glad to meet them; so that I could often visit them. They drove me away. I want you to pay me for coming here. You talk about farming for me and raising stock. I don't like to hear that. I was raised on game and I would like to live as I was raised. If I were brought up like you, our arms would be strong, and I would work like you. We want to kill our own game and be glad. All the Crows feel as I do. We want Dr. Matthews to remain as our agent. (Taking off his Moccasins and offering them to Commissioner Taylor.) *I have nothing else to give you. It is cold weather, but take them.*

COMMISSIONER TAYLOR

I accept them as a token of friendship. I will borrow the warmth of your blood to make me warm.

BLACK FOOT

I was raised and born on the dust, but I shake hands with you all. I am glad to see you. I have come a long way. (Presenting a robe to Commissioner Taylor.) *I make you a present of this robe. It is cold. Take it to cover yourself. The Crows used to own all this Country including all the rivers of the West. When I was a boy, we had no iron to make arrow heads, knives, or axes; and we would roam the prairie and pick up old shoulder blades to make all the things we needed. Then we had no white man among us. We would pick up flints to make a fire and to make arrows and knives. My grandmother used to take a tripe and make a kettle out of it to cook in and also to carry water with.*

You speak of putting us on a reservation and teaching us to farm. We were not brought up to that and are not able to do it. That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised. I know the Great Spirit made a man and woman to live together. We were brought up to fight our enemies, and we do so. The Great Spirit made me not to wash my hands in the blood of the whites. I will never kill or scalp a white man. I am talking with a good, honest heart now. I will advise my young men to do nothing bad. I have a clear conscience and am ashamed of nothing. I want my Great Father to love me all the time.

A long time ago a treaty was made with us. Our agent told us the great Father wanted to see us. We had an enemy's country to go through, but we went. We sold them the California road. They were to give us goods for fifty years. One of our men went to the States some sixteen years ago. We want to know where he is, and to get everything he may have. We did not get the goods promised to us for fifty years. We only received them once. (The Indian he speaks of stepped off the Steamboat going down the river when near St. Joseph, and got drowned.)

We have nothing now, not even a knife. We are very poor and keep getting poorer. The great spirit has forgotten me. We are being surrounded by the whites and by other nations. Our country is getting smaller and smaller. The whites have made two branches of a road besides the California and have cut up the best game country we have. I suppose my great Father was brought up to the use of all good things. I was born and raised naked. He has put his heart to mine. I want you to protect me and to let me live as long as yourselves. I love my children and want them to love you strong, and not a little. Do the same by me. You would be mad if

I were to go into your country and kill all your stock. I cannot go anywhere without coming on some of your people. What have we done to be served in that way? I would like to have them called in and the Road stopped. (Meaning the Powder River Road.) *Your people do not make anything by that Road that I can see.*

I am in earnest with you. All the Indians have been trying to make me fight you and join them. Your people going through the Country looking for gold are the ones who cause us much trouble. When I go to any travelling party of your people and ask for food, they strike me on the head with a club and run me off. When our nation was first called to meet the Commission, we wanted to go to Phil Kearney. We were told you could not go there so we agreed to come here. Up to this time we have been told nothing but lies and we hardly believe now. Give us a good agent. Give us a copy of the treaty that you will make with us. Our present agent is a good man and will not fool us. The food of the white man is not good for us. It makes us sick.

A long time ago we were rich in horses. Now we have but few. When we get back to camp, what we have will die. Give me some horses to go to my camp. Last summer a lot of goods were promised me. All I received was damaged flour which killed a good many of us. My father told me a big lie. (Referring to Judge Kinney.) *I think the words of the Great Father will come to me straight now this time, as General Harney is a good man, and I see him here.*

WOLF BOW

None of us ever fought against you. We have never been your enemies. I am speaking and will always speak the truth. You want me to go on a reservation and farm. I do not want to do that. I was not raised so. I was not

raised on hog meat or cattle. I love buffalo meat and want to remain on my own land. Here are my children behind me. There are yours behind you. Call off your young men from the Powder River road and let that road be abandoned. If you do that, I will think you love me. You white people love your own provisions. Don't trouble my country any more with roads but send every thing up by steam boat. Put the Sioux Indians in their own country and keep them from troubling us. Don't stop fighting them.

The Council then adjourned. The Commissioners agreed to meet the Crows at ten o'clock a.m. Wednesday, the 13th inst, for the purpose of making with them a treaty of peace.

Second Day's Proceedings
Fort Laramie, Dakota Territory
Nov. 13th, 1867

The Council was opened by Commissioner Taylor who replied to the speeches of the Crow Chiefs in Council yesterday, as follows:

COMMISSIONER TAYLOR

Chiefs, Headmen, and Warriors of the Crow Nation. On yesterday you met us in Council and spoke freely. We were glad to hear you because you have always been our friends. We have considered what you have said and I now, in the name of the Commission, answer you. A man can well afford to give friendship for friendship. You spoke of several injuries you received at the hands of white people. If you had not been true to us, you might have gone to war with us, but because your hearts were warm, you forgot those injuries. When the Great Father hears of your injuries he will be sorry. He has some bad children who commit those things without his knowledge, but he is always willing to make you amends.

He will be pleased to know, that you did not go to war. We hope you will always act in the same friendly spirit.

When you have any grievance to complain of, always go to your agent. He will inform your Great Father, and he will have you righted. You speak about our people killing game and leaving it to rot. We are sorry to hear that, but we cannot have our children always under control. We will try to prevent it in future. On account of your refusing to join the Sioux against us, when urged to do so, you are dearer to us than ever. We hope when you return to your country that you will inform the Sioux of our promises and that they will be induced to make peace. We will not allow you to come to us at a heavy cost. You say you have lost a good many horses in coming here and will lose more in returning. We will show you that we know how to reward our friends. We will give you horses, if any can be procured here.

Your countryman of whom you spoke yesterday, went to Washington, was well treated and returned as far as the Missouri River. When last seen he was on a steamboat with many presents which the whites had given him. He disappeared without the knowledge of anybody. He must have been murdered by some bad people or have fallen overboard from the steamer. This Commisison did not know anything of it until they arrived here and made some inquiries about him. They propose to give your nation two horses to make you feel glad. You can dispose of them as you see fit. You object to being placed on a reservation and to farming because you were raised wild on the prairie. Formerly you could find all the game you needed but now the buffalo have entirely disappeared from a large portion of your country. The game will soon entirely disappear.

Our people were formerly confined to the eastern country but they are rapidly spreading all over the West. Your great Father looks ahead and wishes to preserve,

for your own use, some of the good lands as a reservation for you and your children forever. He does not wish to force you to settle down immediately, but simply to keep a place for you, free from the intrusion of the white men. You will still be free to hunt as you are now. You ask us to abandon the Powder River road and to withdraw our troops from that line. The great Father has sent us here to examine that matter, and when we sent for you and the other Indians, we expected to council together in reference to it. We are sorry that all who are interested in that road are not here. If they were, we might settle the question at once, but as only a few are here, we can only tell you what to say to the Sioux when you return. We will consider your wishes in that respect.

We will meet you next spring and settle the matter. The season is so far advanced, the distance to your country is so great, and the property is so bulky and heavy, that we could not leave the posts this winter, if we would, without great loss and suffering. If you will stop the war and keep the peace in good faith until we hold our peace Council next year, we may do as you wish us to do about the road and the posts. But if you go to war we can make no promises, but that we will meet war with war. We hold that road to protect our people against bad Indians. If war continues, the road and posts will be held. If we do not abandon the road in the spring, we will pay you for it. The Great Father prefers peace. He loves his red children and does not want them to perish.

BLACK FOOT

What you have told me today is all good. The Sioux are fighting you, what for, I do not know. I went into the Sioux camp on Tongue River to learn why they were fighting. They told me it was on account of the Powder River Road and that as soon as that road was stopped, they would stop fighting. The Man Afraid of his Horses

told me that. All the whites love him. He is my brother-in-law. When I return to my country, I will tell them all what you have said, and they will be glad. We would like to have the troops withdrawn from our country this winter. The Sioux say they cannot come here now but will come in the spring, when the grass grows.

We are not very numerous, but are very strong and powerful. There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of beaver in all the streams. There is plenty of fish too. I never yet heard of any of the Crow Nation dying of starvation. I know that the game is fast decreasing, and whenever it gets scarce, I will tell my Great Father. That will be time enough to go farming. Your people like to get my country for nothing. That is not right. I want to be paid for it. I believe all you tell me, and whatever you give me, I will be satisfied with. You are speaking of making a treaty now. You have not kept the promises made to us in the last treaty. We have only received goods once, when we ought to have received them every year.

COMMISSIONER TAYLOR

The goods were sent by the Great Father but were stolen by his agents. We will report the matter to him and have you righted.

WOLF BOW

You have tolked good and straight to me today. I am not a fool. I am peaceable and yet you refused me ammunition. The Sioux are trying to get me to join them, but I want to stay with the whites. I do not want my country made the battle ground of the Sioux, as you might think my nation was mixed up with them. If any of your young men want to seek for gold, let them travel on the river. They have good boats. Let those who have no boats travel on the other side of the Missouri where

there is a good trail. I will give you those two trails, one by water, and one by land. I will not give you the Powder River Trail. If you keep on going there, I will get into trouble. There is plenty of gold in our country. I have got some of it. I know where there are plenty of gold mines, but I did not like to tell anybody because there would be so many people come to us. All our people are good. If you give us horses, we will pay you with buffalo robes which we will dress and give our agent.

GENERAL SANBORN

We have drawn up a treaty. Will you sign it now, or at the meeting in Spring?

BLACK FOOT

There are hard feeling between you and the Sioux and it is better to wait until spring, when you will meet them, and you can ascertain their feelings towards you. We will wait until you come to Phil Kearney and you can see all the Indians together. We will then sign the treaty.

APPENDIX B

LETTER, CROW EXHIBIT 4b

Fort Laramie, D.T.
May 20th 1868.

Hon. O. H. Browning.
Secretary of the Interior.
Washington, D.C.

Sir:

I have the honor to enclose treaties, concluded by the Indian Peace Commission, with the Crow Indians of Montana, and the Northern Cheyenne and Arrapahoe Indians. Upon these treaties, the Commission ask the favorable consideration and action of the Department and Senate.

In concluding them, we have conformed, as nearly as circumstances would permit, to the general plan and policy indicated, and adopted by the Commission, in its report last January.

We have had treaty relations with all these tribes before, but our treaties with them have been little more than an empty name; many of them have never seen an agent, nor received a present from the government, nor derived any benefit whatever from former treaties: we have therefore, made our stipulation with them as with a perfectly barborous people.

The Crows, owning mainly, to their friendly disposition by nature, have remained at peace with the whites, but the Cheyennes and Arrapahoes, sympathizing deeply with their relatives, who were slaughtered while supposing themselves under the protection of our government, at Sand Creek in 1864, have carried on a most cruel and relentless war against the whites since that

time. All these Indians have made these treaties, after the fullest explanations, and, no doubt, intend to comply strictly with their stipulations.

These treaties are made with the view of civilizing these Indians, and the terms and conditions are such as the Commission deem absolutely necessary to accomplish this end; hence the long time through which the benefits of the treaties extend. The Commissioners believe, that the Indians cannot become so far civilized, as to be self protecting and self supporting in less time than that occupied in the raising of one generation, and that, during this time, the policy and dealings of the government with them should be fixed and uniform. The expence incurred, in attempting to civilize Indians, in ten or fifteen years, unless followed up the succeeding years, is lost, and the Indian is left in a worse condition, than that preceeding such attempt.

It will be seen from the above, that in fixing the terms of such treaties, the Commission has been governed less by the considerations of the value of possessions ceded by the Indians, than by what they considered essential conditions to the maintenance of peace with and the civilization of the Indians: The whole expence of this thirty years effort to civilize, is no more than thirty weeks expence of actual war with them.

But, if the value of the possessions ceded is to be considered, then, for stronger reasons, the government should not hesitate to have the treaties ratified and executed: Mineral lands of exhaustless wealth and inconceivable value, extending over thousands of square miles, navigable streams, rivers of hundreds of miles in extent, on the banks of some of which, (the Muscel Shell), our capitalists have already invested more than a million dollars in mines of copper, that promise to exceed in richness any that have ever before been dis-

covered: large agricultural tracts, the finest on the eastern slopes of the mountains, are a portion of what these tribes have ceded by this treaty.

It is also of the utmost importance that these treaties should be ratified without unnecessary delay, and the appropriateness called for by them be made the present session of Congress.

The Game has, already, become very scarce in the Indian country that hitherto has furnished subsistence to these tribes: the country no longer supplies sufficient food or clothing, the Indians, must now depend to a great extent upon the government until they have learnt to cultivate the soil and raise crops.

The early commencement of the government to carry the treaties into effect, would satisfy the Indians at once of its good faith and fixed purpose, and would ensure peace and cooperation on the part of the Indians; while long delay produces discontent and discouragement and destroys, to a great extent, the benefits that otherwise would naturally flow from our treaties.

Hoping that the foregoing views may meet your approval and that of the Senate

I remain, very respectfully,
Your obedient servant

John B. Sanborn,
President, pro tem,
Indian Peace Commission

Supreme Court, U. S.
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SEP 27 1980
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No. 79-1128

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE STATE OF MONTANA, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA AND
THE CROW TRIBE OF INDIANS, MONTANA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the bed of the Big Horn River within the exterior boundaries of the Crow Indian Reservation is held in trust by the United States for the Crow Tribe, or, rather, is owned by the State of Montana.

2. Whether the banks of the Big Horn River (between high and low water mark) are held in trust by the United States for the Crow Tribe, or, rather, belong to the owners of the riparian uplands.

3. Whether Crow Tribal Ordinance 74-05, as modified by the court of appeals, is a valid exercise of tribal authority.[1]

[1] Petitioners in their brief present nine separate questions for review. Questions 1 through 5 are rephrased in our Questions 1 and 2, while petitioners' Questions 6, 7 and 8 are included in our Question 3. We do not address petitioners' Question 9—whether the court of appeals violated Rule 52(a) of the Federal Rules of Civil Procedure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2–26) is reported at 604 F.2d 1162. The opinion of the district court (Pet. App. 27–55) is reported at 457 F. Supp. 599. An earlier opinion of the court of appeals in a related case, *United States* v. *Finch* (Pet. App. 56–82), is reported at 548 F.2d 822, and the opinion of this Court vacating that decision is reported at 433 U.S. 676.

JURISDICTION

A modified opinion on rehearing (Pet. App. 2) and an opinion on petition for rehearing (Pet. App. 24) were entered by the court of appeals on September 20, 1979. The petition for a writ of certiorari was filed on January 21, 1980, and granted April 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND TREATIES INVOLVED

The statutes and treaties involved are set forth in the appendix to the petition (Pet. App. 83–120). Additional relevant statutes are set out in the petition (Pet. 4–6).

STATEMENT

1. About four hundred years ago, the ancestors of the Crow Tribe began a migration from the Winnipeg Lake Country through what is now North Dakota, and back to Canada. In the Seventeenth Century, the Tribe recrossed the border to an area encompassing the present Crow Reservation in Southeastern Montana (I J.A. 35–38). By the time the Crow arrived in the Big Horn Valley and surrounding territory, they had adapted to a Great Plains culture (I J.A. 39). Like the Sioux, their traditional enemy, the Crow subsisted mainly by hunting buffalo. In times of scarcity they supplemented their diet with fish (*ibid.*; see also I J.A. 90, 97).

In 1825 the Crow and the United States entered into a treaty of peace and friendship by which the Crow recog-

nized the supremacy of the United States (II J.A. 26, 7 Stat. 266). Warfare between the Sioux, the Crow, and other Tribes, led to the First Treaty of Fort Laramie of 1851 (Pet. App. 83–87, 11 Stat. 749). The seven signatory Tribes agreed to a definition of their several "territories," in the case of the Crow, some 38 million acres, including the entire watershed of the Big Horn River. See Royce, *Indian Land Cessions in the United States*, in [1896–1897] Eighteenth Annual Report of the Bureau of American Ethnology pt. 2, pls. CXLVI, CLXXIII, Areas 398, 399, 517, 619, 635; Appendix, *infra*. However, each of the Tribes expressly preserved "the privilege of hunting, fishing, or passing over" the entire area confirmed as Indian country (Pet. App. 86).

After the Civil War, settlers, miners, and hunters began to encroach on the Crow's territory. In due course, there followed the Second Treaty of Fort Laramie in 1868 (Pet. App. 88–96, 15 Stat. 649), by which the Crow ceded all but approximately eight million acres, formally "set apart" as the "permanent home" of the Tribe (Arts. 2, 4, Pet. App. 89, 90). The Treaty defined the Reservation as follows (Art. 2, Pet. App. 89):

> * * * [The] district of country * * * commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning * * *.

Article 4 of the Treaty (Pet. App. 90) reserved to the Crow the right to hunt and fish on the unoccupied lands of the United States as long as game could be found there and peace prevailed. Although the Treaty did not explicitly refer to hunting and fishing rights on the Reservation proper, Article 2 guaranteed the Crow the "absolute and undisturbed use and occupation" of the lands so reserved, the United States "solemnly" undertaking to

permit "no persons" (other than government agents or the Tribe's invitees) "to pass over, settle upon, or reside in" the Reservation (Pet. App. 89–90).

Subsequently, Congress further diminished the Crow Reservation to its present size—2,282,764 acres (Pet. App. 5).[2] At present, approximately 52% of the Reservation land is allotted to members of the Tribe and held in trust; 17.3% is held in trust for the Tribe as a whole; less than one percent is owned by the United States in fee; two percent is owned by the State; and 28% is owned in fee by individuals (Pet. App. 5; Pltf. Ex. 1).

2. In 1957, the United States condemned certain Reservation lands bordering the southerly portion of the Big Horn River for the construction of Yellowtail Dam and its reservoir. The regulated releases from the reservoir created for the first time conditions favorable to the existence of what is now a thriving trout fishery.[3] With the trout came fishermen—an estimated 6,800 in 1973 alone, the great majority of whom were non-Indian residents of Billings and the surrounding area (II J.A. 23–26, Pltf. Ex. 30). This influx was abetted by the State of Montana which acquired two tracts of land on the Big Horn to provide its citizens fishing access to the river (I J.A. 11, Pre-

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[2] See 22 Stat. 42 (1882); 26 Stat. 1039–1040 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937). And see Appendix, *infra*.

[3] Previously, trout fishing was virtually non-existent on the Big Horn since trout depend upon a clear, cool, and consistent supply of water for their survival. The trout do not migrate off the Reservation since the water quality degrades quickly as the River flows northerly to its confluence with the Yellowstone (Tr. 209; F&G Ex. 95 at 14–19 of substantiating report; F&G Ex. 83 at 10; F&G Ex. 84 at 10; F&G Ex. 85 at 9). "F&G Ex." refers to the exhibits of the Montana Fish and Game Commission; "C.T. Ex." refers to the exhibits of the Crow Tribe.

The River remains less than conducive to spawning and, accordingly, trout must be stocked. Pursuant to a 1970 agreement between the Tribe and the Department of Interior's Bureau of Sport Fisheries and Wildlife, a federal fish biologist stationed in Hardin, Montana, just off the Crow Reservation, oversees the Tribe's fish stocking program on the Reservation (Pet. App. 38; Tr. 66–69). Prior to the closing of the Big Horn, the State took the lead in stocking it.

trial Order—Agreed Facts). The instant lawsuit arose out of the Crow's efforts to control this exploitation of the Tribe's natural resources.

Although the construction of the Yellowtail Dam was, in petitioners' words, the "catalyst for this litigation" (Pet. Br. 11), the issue whether non-Indians may hunt and fish on the Crow Reservation has troubled the Tribe and the United States for as long as there has been a Reservation. In 1873, Blackfoot, a Crow Chief, complained of "whites that are coming into [Crow] country and going into Judith's Basin, eating the game" (III J.A. 144–145, C.T. Ex. 74), and of "whites kill[ing] [buffalo] and put[ting] poison on them to kill wolves" (III J.A. 146, C.T. Ex. 74). On both counts, the Government's representatiave recommended measures to end the encroachments (II J.A. 106–107, 114–115, C.T. Ex. 74). From 1912 to 1923, the Superintendent of the Crow Agency and the Commissioner of the Bureau of Indian Affairs exchanged a series of letters (Pltf. Exs. 6, 9, 11–17, 19–20, 22–27) reflecting the Crow's opposition to whites hunting and fishing on the Reservation. Although the position of the United States was, on occasion, equivocal (*e.g.*, Pltf. Exs. 14, 19, 20, 24), the Tribe consistently and forcibly expressed its belief that non-Indians had no right to hunt and fish there (*e.g.*, Pltf. Exs. 12, 19). During this period the Tribe petitioned the United States to place "strict limitations" on outsiders to "conserve the game and fish upon the Crow Indian Reservation" (II J.A. 1, Pltf. Ex. 18), and passed a resolution expressing "the sense of the [Tribal] Council that no more hunting and fishing by parties who are not members of the Crow Tribe be allowed within the boundaries of the * * * Reservation" (Pltf. Ex. 21 at 24).

In both 1954 (Resolution No. 23, C.T. Ex. 71–o) and 1957 (Resolution No. 149, C.T. Ex. 71–a), the Crow Tribal Council—the entire adult membership of the Tribe—closed the Reservation to hunting and fishing by non-members, although the 1957 resolution instituted a fishing permit system. On August 11, 1961, the Crow Tribal Council

passed Resolution No. 62–02–A making it "unlawful for any person, except members of the Crow Tribe, to hunt, fish or trap within the exterior boundaries of the Crow Indian Reservation" (II J. A. 75, C.T. Ex. 71–i). This prohibition continued until September 17, 1966 when the passage of Ordinance No. 67–1 (C.T. Ex. 71–r) made it lawful for non-members to hunt on the Reservation except in the mountain areas and to fish with a tribal permit. See also Resolution No. 64–20 passed November 16, 1963 (II J. A. 78–82, C.T. Exs. 71–k, 71–l, 71–m).

On October 13, 1973, in its quarterly "town meeting," the Crow Tribal Council enacted Resolution No. 74–05 (Pet. App. 119–120), reciting the Tribe's concern that food prices were rising, tribal membership was growing, and the Reservation's supply of game and fish was dwindling. In light of these conditions, and in order "to help alleviate the game and fish shortage and to help the economic condition of the Crow people" (Pet. App. 119), the Tribe determined to withdraw the permission previously granted non-Indians to hunt and fish on the Reservation. In transmitting the resolution to his Area Director, the Superintendent of the Crow Agency of the Bureau of Indian Affairs described the conditions and problems that led to its enactment (II J. A. 86–90, C.T. Ex. 71–qq):

> The resolution to disallow hunting and fishing on the Crow Indian Reservation expresses the feelings of the Crow people with regard to the ever increasing pressure on reservation game and abuse of hunting and fishing privileges. The tribe's desire to close the entire reservation reflects the grave concern of its members over the erosion of one of the most valued resources and hereditary rights. This office is convinced that the Crows concerns are well founded and that under existing circumstances their action is timely and fully justified. * * *
>
> 1. Hunting pressure on the reservation has increased to a point where game is depleted or non-existent in vast areas.* * *
>
> 2. Regulation of hunting and fishing has become increasingly uncontrollable with the general public

taking advantage of situations beyond the Crow Tribes' ability to control.* * *

3. Actions by the State of Montana and the National Park Service indicate that their unannounced policies are directed toward the development of the entire Crow Indian Reservation for hunting and fishing including the Tribal lands of the Big Horn Mountains, and without regard to the desires of the Crow Tribe of Indians. * * * The press of public opinion to open the entire reservation to hunting and fishing is overwhelming, except for the resistance of the Crow Indians.

4. Regulation of hunting and fishing on the reservation is ineffective under present conditions.* * *

a. The general public has taken advantage of interspersed fee and Indian trust lands to utilize the whole reservation without respect to land status * * *.

b. The permit system in force prior to this resolution brought in revenue estimated at $8,000. The FY 1972 Tribal Program spent $19,500 for Game Wardens and the FY 1973 Program has set up $95,000 for this purpose. * * *

c. * * * Enforcement by the [S]tate [of Montana] is only token to say the least and the [S]tate does not even give the appearance of recognizing that there is a problem.

d. The State of Montana has opened a big game season on Big Horn Lake which includes deer and elk. * * * The Crows sold [this] land to the federal government for the sole purpose of building a dam and reservoir. It was not the understanding that big game hunting would be permitted in this area.

The Crow Tribe employs a force of eight game wardens to enforce Resolution No. 74–05, some of whom are commissioned as federal police officers through the Bureau of Indian Affairs (Tr. 249–253). The tribal game wardens patrol the Reservation by land, in the air and on water (Tr. 253, 258). In contrast, the State of Montana has one game warden assigned to an area of which the Crow Reservation is merely a part (Tr. 311–313, 331).

3. The United States filed this action on October 9, 1975, seeking a judgment declaring that the United States holds title to the bed and banks of the Big Horn River within the exterior boundaries of the Crow Reservation in trust for the Crow Tribe and that the Tribe enjoys exclusive authority to regulate hunting and fishing within the Reservation. The case paralleled *United States* v. *Finch*, 395 F.Supp. 205 (D. Mont. 1975), a criminal prosecution under 18 U.S.C. 1165 originating in the same district court, to ensure that the like issues there presented would be decided if the prosecution failed on other grounds. As it happens, the district court in *Finch*, *supra*, declared that the bed of the Big Horn River belonged to the State of Montana and that Finch, a non-Indian, therefore could not be convicted of trespassing upon Indian-owned land by fishing on the Big Horn River within the Reservation. The court of appeals reversed, 548 F.2d 822 (9th Cir. 1976) (Pet. App. 56–82), concluding that the bed and banks of the Big Horn River within the Crow Reservation were trust lands held by the United States for the Crow Tribe. But this Court summarily reversed on double jeopardy grounds, 433 U.S. 676 (1977), without referring to the other issues. The present case was then pursued.

On July 31, 1978, the district court, adhering to its *Finch* decision, held that: (1) title to the riverbed and banks is in the State of Montana; (2) the State has exclusive jurisdiction to regulate non-Indian hunting and fishing on fee patented lands on the Reservation; (3) the State and the United States, pursuant to 18 U.S.C. 1165, have concurrent jurisdiction to regulate non-Indian hunting and fishing on trust lands within the Reservation; (4) the Crow Tribe's exclusive right to hunt and fish on its Reservation is restricted to trust lands; and (5) the Tribe's regulatory authority on the Reservation is limited to the right to grant or withhold permission to non-Indians to trespass upon trust lands for the purpose of hunting and fishing (Pet. App. 54–55).

On appeal, the Ninth Circuit reversed, and again ruled that the bed and banks of the Big Horn River are held in trust by the United States for the Crow Tribe; that the

Tribe can prohibit non-resident non-Indian hunting and fishing on all lands on the Reservation; but that the Tribe cannot prohibit non-Indian residents from hunting and fishing on their own lands within the Reservation, although they can be made subject to non-discriminatory tribal regulation. The court went on to hold that Montana may regulate non-Indian hunting and fishing on the Reservation so long as State regulation does not interfere with the tribal regulatory program. In effect, the non-Indian is bound to observe the stricter of the two sets of regulations. Finally, the court held that the State cannot regulate directly or indirectly hunting and fishing by members of the Tribe on the Reservation.

The United States filed a motion for reconsideration on three issues: the tribal power to regulate non-member hunting and fishing; the availability of civil forfeiture as a tribal enforcement mechanism; and the existence vel non of concurrent state jurisdiction over non-member hunting and fishing. The petitioners also sought reconsideration, asserting that *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), required the application of state law to define the extent of federal patents of land riparian to the Big Horn River. The amended opinion of the court of appeals (Pet. App. 2) denied both petitions for rehearing. See also Pet. App. 24.

SUMMARY OF ARGUMENT

I

It can no longer be doubted that the United States had the *power* to alienate or reserve to itself for a public purpose the bed and banks of navigable waters that otherwise would pass to the State upon its entry into the Union. And it has been long since settled that among such public purposes is the setting aside of land for the use and occupancy of Indian Tribes. The only question, in each case, is whether the United States *intended* to appropriate or convey the submerged land before statehood.

Where Indian Tribes are involved, an affirmative answer is implicit in the very nature of the grantee. The sovereign character of Indian Tribes, particularly as seen

during the treaty period when they were approached as "Nations", and the solemn commitment of the United States to guarantee the integrity of their "territory", strongly suggest that it was mutually recognized that Indian Tribes were to exercise complete dominion over all land within their borders, not excluding river bottoms. It would be odd indeed to conclude otherwise—that navigable waters wholly surrounded by reservation lands were intended to be excluded from the grant—in view of the common practice of fixing the boundaries of reserved lands at the middle or mid-channel of navigable rivers rather than at the nearer bank. In the instant case, when in 1868 the Crow Tribe ceded to the United States much of the territory previously set aside for it in the First Treaty of Fort Laramie, the new northern border of the Crow Reservation was fixed along "the mid-channel of the Yellowstone River." Since the Tribe gained no new territory by the agreement, the cession of half of the Yellowstone reflects the view of the parties that all of it formerly belonged to the Tribe. *A fortiori*, it must have been understood that the Crow held the bed of the lesser "internal" Big Horn River, once completely surrounded by their lands. Any other conclusion would violate settled rules of construction for Indian treaties, especially where the Tribe was retaining all rights not expressly ceded.

This approach is supported by the uniform course of decisions in the lower courts, and is consistent with the rulings of this Court. On analysis, *United States* v. *Holt Bank*, 270 U.S. 49 (1926), is no exception. That case involved an area as to which the title of the Tribe had not been recognized before statehood, a plainly distinguishable situation.

II

Petitioners' claim that the State of Montana owns the banks of the Big Horn, between low and high water mark, presses too far the role of state law. If, as we submit, the bed of the River was, prior to statehood, effectively reserved for the Crow Tribe, then the banks were as well. Similarly, if we are wrong, both passed to Montana upon

its entry into the Union. Any other conclusion would lead to absurd results. The question remains whether the banks, subsequent to their reservation for the Crow, were conveyed to the State. Certainly Montana could not accomplish this result unilaterally. Nor did the federal patents to riparian tracts, for the general rule is that where federal patents convey uplands adjacent to navigable waters, no part of the bed or banks is included. In the present context, there is no justification for "borrowing" state law to vary the federal rule.

III

The Crow Tribe's claim to an exclusive fishery on the Big Horn River is justified on grounds other than the Tribe's ownership of the bed. It is conceded that the Crow once had an exclusive right to hunt and fish on all lands and in all rivers within the exterior borders of the Reservation. We submit that that property right continues, that it is not necessarily tied to land ownership, and that it has not been substantially diluted by the now-repudiated allotment policy that led to the alienation of various tracts of land within the Reservation. We accept as a permissible accommodation the court of appeals' conclusion that the Allotment Acts impliedly promised the white settler who purchased land within the Reservation that "bagging of game from his front step [would not be] subject to permission of the Crow Tribal Council." However, we resist the expansion of this exception to other areas of the Reservation, including the Big Horn River, and to non-residents who can claim no "justifiable expectation" to share in the Reservation's resources. Nor can the State's purchase of a "wedge" of land within the Reservation justify an open invitation to all comers to hunt and fish without tribal permission.

Finally, we stress that, "proprietary" rights aside, the Crow Tribe enjoys a measure of governmental authority over Reservation activities. In our view, the residual sovereignty of the Tribe over its territory includes power to regulate, in a reasonable and non-discriminatory manner, hunting and fishing by resident non-members, and to exclude (or admit on conditions) outsiders who have no

connection with the Reservation. In this respect, Indian Tribes are unique, still retaining the prerogative to close their borders against all those who can claim no invitation to enter. At all events, we note that the decision of the Crow Tribe to exclude non-resident hunters and fishermen is a reasonable measure to protect threatened Reservation resources.

ARGUMENT

I. THE BED OF THE BIG HORN RIVER

It may be asked how and why a controversy has arisen over the ownership of the bed and banks of the portion of the Big Horn River that remains within the Crow Reservation when, so far as appears, no party to the case has sought to extract minerals or sand or gravel or other material from the river bottom (compare *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 621 (1970)), nor otherwise to disturb the bed or banks (compare *United States* v. *Holt Bank*, 270 U.S. 49, 52–54 (1926)). The answer is that all parties, and both courts below, have assumed that ownership of the riverbed determines—in large measure, if not entirely—the respective proprietary and jurisdictional claims of the State and the Tribe to fishing rights in the Big Horn River, and to license and regulate the taking of fish by others, as well as the accountability of non-Indians fishing there without tribal permission to federal prosecution under 18 U.S.C. 1165.[4]

In fact, there are independent bases for the Tribe's assertion of fishing rights in the River,[5] and non-Indians

[4] As noted in the Statement (*supra*, page 6), the United States instituted the present action to "parallel" the *Finch* case, in which the Tribe's beneficial ownership of the bed of the River was treated as a prerequisite to federal jurisdiction under Section 1165. See Pet. App. 64–65. Accordingly, the complaint here expressly prayed that the title of the United States, holding on behalf of the Tribe, be quieted to so much of the bed of the Big Horn River as remains within the boundaries of the Crow Reservation. Paras 3, 6, prayer (d), R. 1–2, 5–6.

[5] Indeed, the Tribe contends that it retains, on behalf of its members, an exclusive right to hunt and fish throughout the Reservation, except on posted fee land, and, at all events, enjoys full regulatory authority over hunting and fishing within Reservation boundaries, regardless of land ownership. See pages 30–40, *infra*.

elsewhere have advanced alternative arguments.[6] But, under the issues framed here, the Tribe's ownership of the bed and banks of the River puts beyond challenge the tribal claim to an exclusive River fishery and the right of the Tribe to prohibit non-members from fishing in that stretch of the Big Horn, or to license and regulate such fishing, as it prefers. That is reason enough to focus on title to the *solum*, a point squarely decided below and expressly presented here by the petition for certiorari,[7] albeit decision of that question adversely to the Tribe will not foreclose its claims with respect to fishing or fishing regulation.[8]

1. There is no longer any question of the *power* of the United States, before statehood, to alienate or reserve to itself the bed and banks of navigable waters, at least so long as it is done for a public purpose. As this Court said almost a century ago in *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894):

> We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

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[6] Thus, in *Finch* it was argued that the State, as riparian owner, enjoys, for the benefit of all its citizens, a right to fish in the river. See Pet. App. 76–77.

[7] By contrast, the State's claim as riparian owner of the upland was not presented in the petition and is not before the Court, except as to any "banks" between high and low water mark. See Pet. 3–4.

[8] See note 5, page 11, *supra*. Moreover, by faulting the Tribe's prohibitory ordinance only as applied to "non-members who reside on fee patent lands within the Reservation" when "hunting and fishing on tracts on which they reside" (Pet. App. 15), the decision below permits the Tribe to reserve to its members fishing on the Big Horn River. The United States and the Tribe are free to defend that result on the alternative ground that the Tribe enjoys exclusive fishing rights there, or at least authority to exclude outsiders, regardless of the State's ownership of the bed. See pages 30–40, *infra*.

To be sure, in the same case, the Court spoke of such grants as justified only "in case of some international duty or public exigency" (*id.* at 50), and that language, repeated in later decisions (*e.g.*, *United States* v. *Holt Bank*, *supra*, 270 U.S. at 55), is much stressed here. But a reading of the opinion as a whole makes clear that "public exigency" is used in contrast to "piecemeal" dispositions "to individuals as private property" (152 U.S. at 50), and means no more than "other public purposes appropriate to the objects for which the United States hold the Territory" (*id.* at 48). Although in *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 85–86 (1922), the Court formally reserved the question whether vesting ownership of a navigable river bed in an Indian Tribe is such a purpose, it may fairly be said that little doubt was left that the answer must be in the affirmative. Indeed, the matter had been effectively so resolved four years earlier in the context of the Territory of Alaska (*Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87–88 (1918)), and the Court now expressly noted that "the declared purpose of the Louisiana Purchase Treaty with France that statehood should be ultimately conferred on the inhabitants of the territory purchased * * * [does not] var[y] at all the principles to be applied in [the] case." 260 U.S. at 85.

Thus, when the *Holt Bank* case came to be decided here, it went unquestioned that the United States might, before statehood, have reserved the bed of a navigable lake for the benefit of an Indian Tribe, the only issue being one of intent. 270 U.S. at 54–55, 58. And, finally, in *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 633, the Court characterized that rule as "well settled," stressing that the only arguable question was "whether the United States intended to convey title to the river bed" to the Indian Tribes involved.

2. If the power to withhold navigable water bottoms from the State be conceded, it is nevertheless urged that there is a strong presumption against it. We suggest, however, that the force of the presumption varies according to the character of the claimant and the purpose behind the transaction which is said to embrace the bed of a

navigable water body. Indeed, it is not without significance that the rule derives from cases in which the allegation of a grant to water bottoms was advanced by an individual or private corporation. That was the situation in *Packer* v. *Bird*, 137 U.S. 661 (1891), where the claim was rejected because the grant did not "in terms embrace[] the land under the waters of the stream." *Id.* at 672. And it was in a like context that those words were repeated in *Shively* v. *Bowlby*, *supra*, 152 U.S. at 48.

On the other hand, a very different approach has been taken—with one seeming exception—in cases where the claim was that the bed of navigable waters was included in a grant to a quasi-sovereign Indian Tribe. *Donnelly* v. *United States*, 228 U.S. 243, 259 (1913); *Alaska Pacific Fisheries* v. *United States*, *supra*, 248 U.S. at 87–90; *Brewer-Elliott Oil & Gas Co.* v. *United States*, *supra*, 260 U.S. at 87; *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 630–636. Insofar as *Holt Bank* relied on a presumption (but see *Choctaw Nation*, *supra*, 397 U.S. at 634), it stands alone and must be explained by the special circumstances there deemed controlling—as we detail in a moment (pages 18–22, *infra*).

It requires no elaborate argument to justify the different approaches. The piecemeal grants of river bottom to individual proprietors along a navigable stream constitute private privileges, in derogation of public rights; in the usual case, they further no public purpose and, if made only in particular instances, amount to discriminatory favoritism. No such characterization can fairly be given to the inclusion of water bottoms in a large territory set aside for an entire Tribe, confirmed as part of its aboriginal domain or granted in exchange for the ceded homeland. Not only does such an action plainly serve a public purpose, peculiarly within federal responsibility (see *Alaska Pacific Fisheries* v. *United States*, *supra*, 248 U.S. at 88), but the sovereign character of the Tribe and the communal interest of all members (see *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 677–679 (1979)) make it perfectly natural to concede the navigable waters within the boundaries of the territory as included. Especially was

this so during the treaty period, when Indian Tribes were commonly termed "Nations" and viewed as sufficiently independent powers to justify the negotiation of solemn agreements with them, by which the United States guaranteed the integrity of their "territory," typically confirmed by requiring the later admitted State to disclaim all proprietary and governmental rights there.

It is no objection that the United States normally retains legal title to the lands of Indian Reservations. We deem it beyond argument that the federal government, acting during the territorial period, could withhold from the future State the beds of navigable waters equally by withdrawing the area and dedicating it to a special public purpose as by alienation to others. *E.g.*, *United States* v. *Alaska*, 423 F.2d 764 (9th Cir. 1970). So long as the United States maintains the enclave as segregated from the public domain, State claims cannot cross the boundary, save by consent. The rule that federal title to navigable water bottoms inures to the State upon its admission to the Union applies only to the unappropriated lands of the United States. Plainly, it can have no force within an area held in trust for an Indian Tribe, to which beneficial ownership is expressly conceded and whose interest is "property" protected against appropriation or alienation by the Fifth Amendment. See, *e.g.*, *United States* v. *Sioux Nation of Indians*, No. 79-639 (June 30, 1980), slip op. 35-36, 42-43, 50-51. To hold otherwise would be inconsistent with the original objective of most Indian Reservations established before statehood: to define an "Indian country" protected from outside intrusion, including interference by a later admitted State. Cf. *United States* v. *Kagama*, 118 U.S. 375, 381-384 (1886).

These considerations are reflected in the many instruments creating Indian Reservations expressly describing a boundary as the "middle" or "mid-channel" of a navigable river, as opposed to the nearer bank.[9] That contrasts

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[9] See, *e.g.*, Treaty of Tellico with the Cherokees of Oct. 25, 1805 (7 Stat. 93, 2 *Indian Affairs—Laws and Treaties* 82 (C. Kappler ed.

sharply with the language of private grants from the United States bordering navigable waters, but is a common feature in defining interstate boundaries. See, *e.g.*, *Texas* v. *Louisiana*, 410 U.S. 702 (1973); *New Hampshire* v. *Maine*, 426 U.S. 363 (1976). Plainly, such descriptions, whether they occur in Acts of Admission or in Indian treaties, carry the same consequence of conveying half of the bed of the stream. And the reason, we surmise, is much the same: to confirm to the "political society" involved, for the benefit of all its inhabitants, at least a share in the benefits of the stream, as part of its newly defined sovereign territory. See *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 631-632 n.8. To this, we may add, in the case of Indian Reservations, a special concern to create, where possible, a "buffer zone" that will place the nearer bank clearly off-limits to intruders—sometimes accomplished by including the whole river bed within the

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1904) (hereafter "Kappler"); see Royce, *supra*, pls. CLXI and CLXII, Area 105), setting a new boundary, defined, in part, as "up the middle of the Tennessee river (but leaving all the islands to the Cherokees)"; Report of Survey of July 1, 1863 with respect to the Sioux of the Mississippi (1 Kappler 895; see Royce, *supra*, pl. CXIX, Area 443), establishing a Reservation described, in part, as "to the middle channel of the Missouri River; thence up said channel;" Treaty of Washington with the Chippewa of the Mississippi, and Pillager and Lake Winnibigoshish bands of Chippewa of May 7, 1864 (13 Stat. 693, 2 Kappler 862), establishing a Reservation defined, in part, as "down the centre of the main channel of Red Lake River;" Treaty of Medicine Lodge Creek with the Kiowa and Comanche of Oct. 21, 1867 (15 Stat. 581, 2 Kappler 977; see Royce, *supra*, pl. CXXX, Area 510), redefining their Reservation, in part, as "down [the] north fork [of the Red River], in the middle of the main channel thereof, * * * to the main Red river; thence down said river, in the middle of the main channel thereof." And see note 12, page 18, *infra*.

A further example is the Judith Basin Reserve, set apart for the Crow by an Executive Order of January 31, 1874 (1 Kappler 859) pursuant to the Agreement of August 16, 1873 (II J.A. 111-115), and rescinded the following year (1 Kappler 859-860). Its northern boundary was defined as "the middle" of the Missouri River. See Royce, *supra*, at 864-865, 870-871, 880-881, pl. CXLVII, Area 557.

Reservation;[10] in other instances, including all except the farther shore above low water mark.[11]

Given that so commonly Indian treaties expressly include a portion of the beds of navigable streams bordering the Reservation, it would be odd to indulge a presumption against it when the description is less explicit. It is, therefore, not surprising that this Court has construed somewhat ambiguous language to encompass some part of the water bottoms adjacent to the upland boundary. See *Choctaw Nation* v. *Oklahoma*, *supra*. But it would be stranger still to presume that navigable waters wholly surrounded by Reservation lands were intended to be excluded from the grant. For, in that case, there is normally greater cause both to concede the area as appropriately belonging to the "public" of the Indian territory and to exclude the claims of any future State and its citizens.

What is more, where "inland" water bodies are involved, it would have been blatantly deceptive to the Indians to have withheld the beds and banks from a description apparently including them without a word of warning. It is wholly unreal to suppose the Indians, who accepted the protection of the United States in part *against* the intrusion of the white public and all other powers, foreign and domestic, understood that an exception must be implied for submerged lands underlying waters deemed navigable according to rules unknown to them. To read an Indian treaty or agreement as embodying such an unwritten—and unfamiliar—clause would plainly violate settled rules of construction. See, *e.g.*, *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 675–678 & n.22; *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 631;

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[10] *E.g.*, Executive Order of March 6, 1880, with respect to the Moses Band of the Nez Perce (1 Kappler 904; see Royce, *supra*, pl. CLXVIII, Area 618), expanding a Reservation bounded on the south by Lake Chelan, but defining the boundary as "following the meanderings of the south bank of said lake."

[11] *E.g.*, Treaty of Fort Laramie with the Sioux of Apr. 29, 1868 (15 Stat. 635, 2 Kappler 998; see Royce, *supra*, pl. CXVIII, Areas 409, 598, 632), defining a Reservation west of the Missouri, but "commenc-

Alaska Pacific Fisheries v. *United States*, *supra*, 248 U.S. at 89; *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899).

3. It would seem to follow that, with respect to Indian Reservations established before statehood, one ought, as a general rule, to construe the description as encompassing all waters and submerged lands included within the outer boundaries, except as expressly withheld. That, indeed, has been the approach uniformly followed in a large number of lower court cases dealing with the question.[12] These decisions, adjudicating title to navigable water bottoms in favor of Indian Tribes, constitute a substantial corpus of property law which ought not lightly be disturbed. It is suggested, however, that the lower court precedents cannot overcome the force of this Court's ruling in *United States* v. *Holt Bank*, *supra*, a case which is said to apply the presumption against alienation of navigable beds held in trust for a future State in denying the claim advanced on behalf of an Indian Tribe. We now examine that argument and conclude that *Holt Bank* is, in fact, no exception to the settled rule.

A closer look at the *Holt Bank* case reveals that it has been misread. As this Court noted in *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 634, the result was not reached on a "blind" application of a presumption in favor of State ownership, but only after "examin[ing] the cir-

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ing on the east bank of the Missouri river," thence proceeding for several hundred miles "along low-water mark down said east bank."

Significantly, where no part of the river bed is intended to be included, the treaty typically fixes the boundary on the nearer bank by express words. *E.g.*, Treaty of Hopewell with the Chickasaw of Jan. 10, 1786 (7 Stat. 24, 2 Kappler 14), defining the boundary of that Nation, on the north, as "thence down the southern banks [of the Ohio River];" Treaty of Castor Hill with the Kickapoo of Oct. 24, 1832 (7 Stat. 391, 2 Kappler 365), establishing a Reservation for that Tribe west of the Missouri and defining the eastern boundary as "the west bank of the Missouri river."

[12] See, *e.g.*, *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946), cert. denied, 330 U.S. 827 (1947) (Quillehute River and adjacent tidelands are part of the Quillayute Indian Reservation); *United States* v. *Romaine*, 255 F. 253 (9th Cir. 1919), *United States* v. *Boynton*, 53 F.2d 297 (9th Cir. 1931), and *United States* v. *Stotts*, 49 F.2d 619 (9th

cumstances in detail." And, as the *Holt Bank* opinion stresses, the circumstances there were wholly atypical.

What was in dispute was the now drained and uncovered bed of Mud Lake, once a navigable body of water within the boundaries of an area of unceded Indian lands that came to be known as the Red Lake Reservation. 270 U.S. at 52–53, 57, 58. Long before the case, most of the Reservation and all the tracts surrounding the lake had been "relinquished and ceded" by the Chippewas and sold off to homesteaders. *Id.* at 52–53. See Royce, *supra*, at 934–935, pl. CXLII, Area 706. There was thus presented the somewhat anomalous claim of title to a lake bed, far removed from the diminished Reservation and no longer serving any tribal purpose except as a source of funds from the sale of lots. In these circumstances, it is not surprising that the Court was reluctant to conclude that the lakebed was an integral part of the Reservation. Cf. Mr. Justice White, dissenting, in *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 653–654; *Puyallup Tribe* v. *Washington Game Dept.*, 433 U.S. 165, 173–174 & nn. 11, 12 (1977).

There was, moreover, another, perhaps more critical, consideration informing the decision in *Holt Bank*. That was the questionable status of the Red Lake Reservation before Minnesota became a state. Although the Court had earlier determined that the area involved should be recognized as an Indian Reservation, that was primarily on the basis of congressional and presidential actions taken long after Minnesota was admitted to the Union in 1858. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 388–402 (1902). Such

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Cir. 1930) (all three cases hold that a portion of the bed of the Nooksack River is a part of the Lummi Indian Reservation); *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir. 1942), *United States* v. *Pollmann*, 364 F. Supp. 995 (D. Mont. 1973), and *Confederated Salish and Kootenai Tribes* v. *Namen*, 534 F.2d 1376 (9th Cir. 1976) (all three cases hold that the Tribes hold title to the bed of the Flathead Lake within the Reservation boundaries); *Heckman* v. *Sutter*, 119 F. 83 (9th Cir. 1902) (individual Alaskan Natives' rights in tidelands protected); *United States* v. *Finch*, 548 F.2d 822 (9th Cir. 1976), vacated on other grounds, 433 U.S. 676 (1977) (bed of the Big Horn River within Reservation boundaries is beneficially owned by Crow Tribe).

post-statehood acts, before survey, were held sufficient to defeat the State's claim to school sections in place—a grant that attaches only after survey and can be transferred to other "lieu" lands by any prior withdrawal embracing the numbered sections. *United States* v. *Wyoming*, 331 U.S. 440, 443–444 (1947); *Andrus* v. *Utah*, No. 78–1522 (May 19, 1980), slip op. 6–7.[13] But it did not follow that such post-statehood recognition of unceded Indian lands as a Reservation would have retroactive effect so as to divest the State of title to navigable water bottoms, a title inuring immediately upon admission by the force of the Constitution itself. See *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372–374 (1977).

Looking to what had occurred before Minnesota became a state in 1858, the *Holt* Court concluded that in the treaties preceding statehood there had been, with respect to the Red Lake area—unlike other areas—"no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein." 270 U.S. at 58. That is, of course, correct. The historic fact is that, as of 1858, the United States had never formally recognized the title of the Chippewas to the Red Lake area.

The only two pre-statehood treaties arguably relevant to the question cannot be stretched so far, however generously they are construed in favor of the Indians. The first of these is the Treaty of Aug. 19, 1825 (7 Stat. 272, 2 Kappler 250), designed to end warring, *inter alia*, between the Chippewas and the Sioux, which set a boundary between their respective "countries" (Art. 5), and also between the Chippewas and the Winnebagoes (Arts. 6, 7).[14]

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[13] Indeed, in distinguishing *Beecher* v. *Wetherby*, 95 U.S. 517 (1877) and invoking *United States* v. *Thomas*, 151 U.S. 577 (1894), the Court in *Minnesota* v. *Hitchcock* seems to be holding that even unrecognized Indian title will defeat the grant of a school section in place so long as actual occupation by the Indians is maintained with the acquiescence of the United States. 185 U.S. at 392–393, 396–398, 401–402. See, also, *Gaines* v. *Nicholson*, 50 U.S. (9 How.) 356, 364 (1850); *Wisconsin* v. *Hitchcock*, 201 U.S. 202 (1906).

[14] There is, also, a full boundary description for the "country secured" to the "tribes of the Illinois," including a Chippewa band (Art.

But these lines of demarcation, at least 200 miles to the south and east, obviously cannot be taken to confirm the Chippewa title to the area embracing Red Lake and Mud Lake. The same remark applies to another treaty with the Chippewas, concluded July 29, 1837 (7 Stat. 536, 2 Kappler 491). In describing the extensive cession to the United States (Art. 1), there are references to "the line dividing the territories of the Chippewas and Menomonies," "the southern boundary of the Chippewa country," and "the boundary line dividing it from that of the Sioux." Again, however, the boundaries described are far removed from Mud Lake and there is no indication that that area was deemed included in the "Chippewa country." See Royce, *supra*, pls. CXL, CLXXI, Area 242.[15]

There were, to be sure, two further pre-statehood treaties, concluded on September 30, 1854 (10 Stat. 1109, 2 Kappler 648) and February 22, 1855 (10 Stat. 1165, 2 Kappler 685), by which the Chippewas ceded large areas south and east of Red Lake (see Royce, *supra*, pl. CXL, Areas 332, 357). But these are even less instructive with respect to the area involved in *Holt Bank*. There is barely a refer-

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9). But this district, mainly in the present State of Illinois, is wholly remote from the area involved in *Holt Bank*.

[15] Earlier treaties with the Chippewas affected only lands in Ohio and Michigan. See Treaty of July 4, 1805 (7 Stat. 87, 2 Kappler 77); Treaty of Nov. 17, 1807 (7 Stat. 105, 2 Kappler 92); Treaty of Sept. 29, 1817 (7 Stat. 160, 2 Kappler 145); Treaty of Sept. 24, 1819 (7 Stat. 203, 2 Kappler 185); Treaty of June 16, 1820 (7 Stat. 206, 2 Kappler 187); Treaty of July 6, 1820 (7 Stat. 207, 2 Kappler 188); Treaty of Aug. 29, 1821 (7 Stat. 218, 2 Kappler 198). Equally irrelevant are the Treaties of July 29, 1829 (7 Stat. 320, 2 Kappler 297) and of Sept. 26, 1833 (7 Stat. 431, 2 Kappler 402), dealing with lands in Wisconsin and Illinois. And the same is true of the Treaties of Mar. 28, 1836 (7 Stat. 491, 2 Kappler 450), of May 9, 1836 (7 Stat. 503, 2 Kappler 461), and of Jan. 14, 1837 (7 Stat. 528, 2 Kappler 482), again affecting only lands in Michigan; and, also, the Treaty of Oct. 4, 1842 (7 Stat. 591, 2 Kappler 542), affecting lands in Wisconsin and Michigan. Finally, the Treaties of Aug. 2, 1847 (9 Stat. 904, 2 Kappler 567), and of Aug. 21, 1847 (9 Stat. 908, 2 Kappler 569), affecting lands in Minnesota, should be noted. However, they concern only very distant tracts and are wholly silent as to the Red Lake area. See Royce, *supra*, pl. CXL, Areas 268, 269.

ence to what remained Chippewa "country,"[16] and no suggestion that it embraced what later became the Red Lake Reservation. Indeed, the indications are the other way. For it appears that the Chippewas are ceding *all* their lands,[17] except for a number of specific tracts, which are expressly set apart in these treaties for various bands, but do not include the Red Lake area. See 270 U.S. at 58 n. *; Royce, *supra*, pls. CXXXVII, Areas 333, 340; CXL, Areas 358-360, 453, 455-457; CXLI, Areas 338, 339, 354; CLXXII, Areas 334-337, 341, 342.

The upshot is that, as of 1858, there had been no treaty recognition or confirmation of any Chippewa title to the area later known as the Red Lake Reservation. At the earliest, that occurred—and then only by implication—in 1863, when a separate treaty was executed with the Red Lake and Pembina Bands and the United States accepted from them the cession of a territory west of Red Lake. Treaty of Oct. 2, 1863 (13 Stat. 667, 2 Kappler 853). See Royce, *supra*, at 828 and pl. CXL, Areas 445 (ceded), 446 (unceded). Presumably, the *Holt* Court took the view that mere unrecognized "Indian title" could not defeat the State's constitutional claim to navigable water bottoms, effective upon admission to the Union. Such a ruling

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[16] Both treaties (Art. 1 of each) refer to the "southern boundary line of the Chippewa country," but, in each case, the area so bounded is now ceded.

[17] By the 1854 treaty (Art. 1) the Chippewas of Lake Superior relinquished to the Chippewas of Mississippi, "all their interest in and claim to the lands heretofore owned by them in common, lying west of the [cession] boundary line"—a wholly undefined territory. The next year, however, the Chippewas of Mississippi "fully and entirely relinquish[ed] and convey[ed] to the United States, any and all right, title, and interest, of whatsoever nature * * * to any other lands in the Territory of Minnesota or elsewhere" (1855 Treaty, Art. 1). This provision would have extinguished Indian title to the area embracing Red Lake and Mud Lake if the Red Lake Band had been deemed members of "the Chippewas of the Mississippi." Presumably, that band was deemed separate, for they ceded a portion of their lands in Minnesota by a later treaty in 1863. See text, *infra*. It follows that the 1854 and 1855 treaties did not remotely recognize the claim of the Red Lake Chippewas to the area involved in *Holt Bank*.

plainly does not control the situation in which, before statehood, the United States, by formal treaty, expressly sets apart an area for a particular Tribe of Indians, defining boundaries which include navigable waters. In sum, the *Holt Bank* decision is irrelevant to the present case.

4. It remains only to apply the controlling principles to the present case. That is quickly done.

a. The title of the Crow to an area that encompasses the Big Horn River was first recognized by the United States in the First Treaty of Fort Laramie, concluded September 17, 1851 (11 Stat. 749, 2 Kappler 594, Pet. App. 83–87). At that time, the Crow lands were largely surrounded by "territories" confirmed to other Tribes: the Sioux to the southeast, the Blackfeet to the west and north, the Assinaboin to the northeast and the Gros Ventre, Mandans and Arrickaras to the east. Art. 5; see Royce, *supra*, pls. CXVIII, CXLVI, CLXXIII, Areas 300, 398, 399, 517, 529, 619, 620, 635; and see Appendix, *infra*. If a question had then arisen as to the ownership of the beds of the boundary rivers dividing these "territories" and entirely within recognized "Indian country"—the Yellowstone, the Musselshell and the Powder—presumably the same answer would have been given as in *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 628, 634-635. *A fortiori*, one would suppose, the bed of the Big Horn River, entirely within the area confirmed to the Crow, and so much of the Yellowstone River as was also wholly within their boundaries, would have been conceded to that Tribe.

Indeed, that understanding was confirmed, with respect to the Yellowstone River, when, in later years, the Tribe ceded to the United States much of its former territory. By the Treaty of May 7, 1868 (15 Stat. 649, 2 Kappler 1008, Pet. App. 88–96), the new northern boundary of the Crow Reservation was fixed along "the mid-channel of the Yellowstone river" (Art. 2). Since the Tribe gained no new territory by this agreement, it is apparent that both parties considered the bed of the Yellowstone River, so far as within the 1851 boundaries, as belonging to the Crow, and that they were now ceding half of it and retaining the

other half. Indeed, that construction is reflected in two further cessions, one shortly before and one shortly after Montana became a State in 1889. See Act of Apr. 11, 1882, ch. 74, 22 Stat. 42; Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1039–1040. In each case, the Crow were relinquishing lands along the Yellowstone and the description expressly sets the northern boundary of the cession at the "mid-channel" of that river, thereby indicating that the Tribe had retained half the bed in 1868.[18]

Obviously, the same principle, applied to the Big Horn, requires the conclusion that the Tribe held the bed of that lesser river and retained the stretch within the diminished Reservation. As it happens, moreover, that result also is expressly confirmed in a later transaction. The 1891 cession just mentioned was, in part, bounded on the east by the Big Horn River (see Appendix, *infra*) and, once again, that boundary is described as "the mid-channel of said river." Act of Mar. 3, 1891, 26 Stat. 1040. That language can only mean that the bed of the river was held by the Crow, half of which they were now ceding in the affected stretch, retaining the other half there and the whole of the bed where it remained surrounded by their lands.[19]

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[18] The remaining Crow lands along the Yellowstone were relinquished by the Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352, ratifying and amending an agreement of August 14, 1899. See Appendix, *infra*. Here, the western and northern limits of the cession are merely referred to as "the present boundary of said reservation." Art. I of the Agreement, reproduced in the Act. This is, of course, wholly consistent with the previous definition of the northern boundary as reaching to the mid-channel of the Yellowstone River.

Although it was rescinded six months later (1 Kappler 857), we should also note an Executive Order of October 20, 1875 (1 Kappler 857), restoring to the Reservation a 20-mile strip north of the Yellowstone River (ceded in 1868). It defined the southern boundary of the addition as the "mid-channel" of that river, presumably on the understanding that the southern half of the Yellowstone remained part of the Reservation. See Royce, *supra*, at 882–883, pl. CXLVII, Area 585.

[19] There is nothing inconsistent in a later cession of a small tract, including the present site of the Town of Hardin, which fixes the eastern boundary of the grant "along the west meander line of the said Big Horn River." Act of Aug. 31, 1937, ch. 890, 50 Stat. 884. Presumably, at that point, the Crow retained the whole bed.

These descriptions leave no room for doubt that both the United States and the Crow at all times considered the bed of the Big Horn River part of the original territory confirmed to that Tribe. Nor is there any question here that the tribal title to the lands encompassing that bed was effectively recognized before Montana was admitted to the Union in 1889.

b. Both the Court of Claims and the Ninth Circuit have construed the Treaty of Fort Laramie of 1851 as governmental recognition of Crow title to the area there defined as their territory, which includes the entire stretch of the Big Horn River. *Crow Tribe* v. *United States*, 284 F.2d 361, 371 (Ct. Cl. 1960); *United States* v. *Finch*, *supra*, 548 F.2d at 829–830, Pet. App. 70–71. Thereafter, the Territory of Montana was created in 1864, and the Organic Act expressly safeguarded the personal and property rights of the Indians so long as "unextinguished by treaty between the United States and such Indians." Act of May 26, 1864, ch. 95, Section 1, 13 Stat. 85, 86, II J.A. 29, 30. See, also, Section 17 of the same Act, 13 Stat. 91–92, II J.A. 43–44. This would seem fully sufficient to protect the Crow lands recognized by the Treaty of 1851. But there is, in fact, much more.

Whatever the effect of the Treaty of 1851, the Crow Reservation was formally established by the Treaty of 1868. By that agreement, the territory described was solemnly "set apart for the absolute and undisturbed use and occupation" of the Crow (Art. 2, Pet. App. 89), as their "permanent home" (Art. 4, Pet. App. 90), the United States further promising that, except for government agents and such other Indians as the Tribe might admit, "no persons * * * shall ever be permitted to pass over, settle upon, or reside in" the Reservation (Art. 2, Pet. App. 89–90). No more formal recognition of the Crow's exclusive rights within defined boundaries could be wanted. Plainly, these stipulations repel any notion that the future State of Montana, or its lessees, would be free to exploit the bed of the Big Horn River in the heart of the Crow Reservation. That bed was no part of what was ceded;

presumptively, it was retained. Cf. *United States* v. *Winans*, 198 U.S. 371, 381 (1905). This was surely the understanding when Montana was admitted to the Union in 1889, on the condition it "forever disclaim all right and title * * * to all lands lying within [its] limits owned or held by any Indian or Indian tribes * * * until the [Indian] title thereto shall have been extinguished by the United States." Act of Feb. 22, 1889, ch. 180, Section 4, 25 Stat. 676, 677, App. to Pet. Br. 13–14.

c. To be sure, in later years, in consequence of the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (Pet. App. 97–104) and the Crow Allotment Act of 1920, ch. 224, 41 Stat. 751 (Pet. App. 105–118), many tracts within the Reservation, originally allotted to members of the Tribe, were alienated to non-Indians, and a number are now held by the State of Montana. So, also, Section 16 of the Crow Allotment Act (41 Stat. 756–757, Pet. App. 117) granted school sections to the State, albeit the minerals were reserved to the Tribe. But it is not suggested that any of these alienated parcels included the bed of the Big Horn River. Nor is it remotely arguable that the Reservation was thereby disestablished or diminished. In these circumstances, it cannot be assumed that the Tribe, by some silent and imperceptible process, lost its title to the riverbed.[20] Congress might have abrogated the treaties of 1851 and 1868 in this respect. But a clearer purpose to do so would be required. Cf. *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 690. As we have noted, the only indication of congressional intent is to the contrary: in 1891, after the enactment of the General Allotment Act, and after Montana had become a State, Congress treated

[20] The situation here is wholly unlike that in *Puyallup Tribe* v. *Washington Game Dept.*, *supra*. There, the Court suggested that the Reservation had been disestablished, or at least diminished to 22 acres (433 U.S. at 173–174 & n.11), whereas, here, no such suggestion is made and some 70% of the land remains in Indian ownership. See page 3, *supra*. Moreover, in *Puyallup*, the Court stressed that all tracts riparian to the river had been alienated (433 U.S. at 174), and it may have assumed that those tracts extended to the middle of the stream, as would be the normal rule if the river is non-navigable.

the bed of the Big Horn River as still owned by the Crow Tribe.

We conclude that the Crow Tribe retains half the bed of the Big Horn where it now defines the Reservation boundary and the whole of that bed to the north where it traverses their diminished territory.

II. THE BANKS OF THE BIG HORN RIVER

The question who owns the banks of the Big Horn River—the area between low and high water mark—is one of doubtful practical importance in this case, if only because Yellowtail Dam has substantially regularized the flow of the river. Nevertheless, petitioners have vigorously maintained that the riparian upland proprietors (presumably including Crow allottees and the Tribe itself) own to low water mark. Although both courts below decided otherwise, the issue is again presented by the petition for certiorari.[21] Accordingly, we address it, albeit briefly.

As we understand it, the argument advanced by petitioners is that the law of Montana governs the question, regardless whether the bed of the river is held by the United States in trust for the Tribe or by the State. We disagree. In our view, if the bed and banks of the navigable Big Horn River had inured to Montana upon its admission to the Union—as would be the case had they not previously been reserved for the Tribe—the State would, of course, have been free to grant the banks to riparian owners, whether by special deed or by general statute. But if, on the contrary, the United States withheld the bed and banks for the benefit of the Tribe—as we maintain (Point I, *supra*)—Montana can no more appropriate the banks to itself, or give them to others, than it can usurp or alienate other federal or tribal lands.

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[21] We assume the question is properly here because the court of appeals, although denying rehearing, expressly considered and decided it on Montana's application. Pet. App. 24-26. But for that circumstance, the issue might be foreclosed by the failure of petitioners to appeal the district court's ruling that the bed and banks must be deemed in the same ownership. See Pet. App. 40-45, 54; Pet. 17.

1. The predicate of our submission is that, before statehood, the United States effectively reserved for the Crow Tribe the bed and banks of the Big Horn River. We appreciate that petitioners dispute whether any such reservation of the riverbed occurred. But, assuming there was an effective reservation, we are not aware that any party challenges that it embraced both the banks and the bed. On the contrary, it is clear that if it does not own the bed, the State is only claiming the banks where it is the upland proprietor by virtue of later federal patents, not as sovereign lands inuring to Montana upon admission to the Union. The common assumption of all litigants and of both courts below is that if the Treaty of 1851 or 1868 withheld the bed of the Big Horn from the future State, the banks to high water mark were likewise withheld. Indeed, any other view would be absurd, since the banks would then have passed to the State under the rule of *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845), and its progeny,[22] creating an anomaly wholly at odds with the purpose of reserving the bed itself to the Tribe.[23]

In sum, there are only two possibilities: either the bed *and* banks of the Big Horn River were reserved to the Tribe before statehood, or *both* passed to Montana in 1889. The only question is whether, in the first hypothesis, the banks somehow later became severed from the tribal bed, held in trust by the United States.

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[22] From *Pollard's Lessee* v. *Hagan*, *supra*, 44 U.S. (3 How.) at 229–230, through *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 374, 375, 376, it has always been clear that unless previously reserved or alienated, the "shores" or "banks" of navigable waters, to high water mark, pass to the State upon its admission to the Union. The Equal Footing Doctrine of course applies the same rule to all States—albeit we assume nothing prevents any State from returning a part of the grant.

[23] In theory, the State could have cured the anomaly by disclaiming the benefit of the constitutional grant of the banks in favor of the Tribe. But the parties to the Treaties of 1851 and 1868 would hardly have relied on such unusual prospective action by a future State, whose laws could not be known, when deciding whether to include the banks in the area reserved. Besides, Montana could not so act until it became a State in 1889 and, in the meantime, the banks would have been excluded from the Crow Reservation and left open to intruders.

2. We do not know whether petitioners claim the State could have accomplished this result unilaterally, simply by adopting as a rule of property law that upland riparian proprietors along navigable streams own to low water mark. At all events, we deem the answer obvious. If a State can thus appropriate the banks, notwithstanding they were reserved by the United States for an Indian Tribe, there is no principled stopping place. Why should not the State be equally free to confer on the riparian owner the bed itself, to the middle of the stream? So far as we are aware, no decision by this or any other Court concedes the power of a State to take or alienate reserved lands of the United States, or tribal lands, except as expressly authorized by Congress. Cf. *United States* v. *Oregon*, 295 U.S. 1, 26-29 (1935).

Certainly, nothing in *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, or *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), condones such a result. Those decisions permit State law to determine the effect of physical changes in a riverbed. But they do not remotely suggest that local law can vary an "initial boundary" fixed by federal act when neither man nor nature has intervened to alter the position of the line relative to a body of water. See, *e.g.*, 429 U.S. at 370, 376; 442 U.S. at 673.

Nor is this a case in which it is reasonable to adopt State law as the federal rule. We deal here, not (as in *Wilson*) with lands on the edge of a Reservation, but with riverbanks in the heart of what remains unquestionably "Indian country." In most respects, State law has no business there. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975). Certainly, it is wholly inappropriate to invoke the riparian property rules of Montana to resolve any dispute over riverbanks between the Tribe and Crow allottees who still hold riparian lands. Yet, to apply that law only when those tracts are transferred to non-Indians or to the State would create awkward anomalies. What is more, the alienated tracts may return to Indian ownership. See 25 U.S.C. 463e, 465. Here, plainly, a uniform federal rule is called for.

3. Petitioners, it seems, recognize the obstacle and place their reliance on the federal patents, asserting that, in the absence of an expressed intent to the contrary, the extent of the rights thereby conferred ought to be judged according to State law. That, indeed, has been held with respect to grants abutting *non*-navigable streams, where the United States "completely part[s] with its territory." *E.g.*, *Oklahoma* v. *Texas*, 258 U.S. 574, 594–595 (1922), as explained in *Wilson* v. *Omaha Indian Tribe*, *supra*, 442 U.S. at 671 n.18. But, in the case of federal patents conveying uplands adjacent to a *navigable* body of water, the general rule is that no part of the bed or banks is included, because these usually belong to the State or are held in trust for a future State. See, *e.g.*, *Shively* v. *Bowlby*, *supra*, 152 U.S. at 48–57. The same presumption, we submit, applies when the bed and banks are held in trust for an Indian Tribe.

No doubt, the United States has the power to alienate tribal lands, although in derogation of treaty obligations. But only the plainest indication of an intent to do so will work such a defeasance, even when the initial beneficiaries would be individual members of the Tribe. See *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655–656 (1976). There is nothing of the kind here.

As we have already noted, neither the General Allotment Act of 1887 nor the Crow Allotment Act of 1920 can be read as relinquishing tribal ownership of the bed of the Big Horn River. There is no better reason to construe those enactments as affecting the river banks, whether directly or by requiring the banks to be included in allotments of riparian uplands. Cf. *Montana Power Co.* v. *Rochester*, *supra*, 127 F.2d at 192. On the contrary, the 1920 Act expressly reserves from allotment a large mountainous area abutting the Big Horn River in the southeastern portion of the Reservation (Section 1, 41 Stat. 751, Pet. App. 105; see Pet. Br. 6 n.12), as well as "lands * * * chiefly valuable for the development of water power" (Section 10, 41 Stat. 754, Pet. App. 112), which obviously included some portion of the river banks. And neither the

trust patents nor the fee patents make any reference to lands below high water mark. In these circumstances, it would be wholly wrong to construe these instruments—contrary to the usual rule—as encompassing the adjacent river banks.

III. HUNTING AND FISHING WITHIN THE RESERVATION

As petitioners themselves stress (Pet. Br. 30), only very narrow issues are presented with respect to hunting and fishing on the Crow Reservation. There is no question about the right of tribal members to hunt and fish anywhere within the Reservation, exempt from State regulation. It appears to be conceded that the Crow may freely hunt and fish on State-owned land, including the Big Horn River even if the bed belongs to Montana. No issue arises as to the right of the Indians to hunt and fish on privately held non-Indian tracts, no doubt because the Crow have never pressed any claim to ignore fencing or posting by individual proprietors. Of course, the Tribe, if need be, would assert a right to cross private land to gain access to hunting and fishing grounds (see *United States* v. *Winans*, *supra*), but no dispute in that respect is presented here. The State claims no right to require licenses of tribal members or otherwise to regulate their hunting and fishing,[24] and, on the other hand, fully concedes the Tribe's authority to control the activities of its members.

The only controversy before this Court concerns hunting and fishing by non-members within the boundaries of the Crow Reservation. Even then, the dispute is limited. The State (and the other petitioners) do not challenge the Tribe's absolute authority to prohibit, or to license and regulate, non-member hunting and fishing on Indian lands, whether held tribally or individually. The only question arises as to hunting and fishing by non-members on Reservation lands owned in fee by non-Indians or by the

[24] There is no suggestion here that tribal activities on the Reservation threaten the survival of any migrating species, a situation that might justify State intervention. See *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 683-684.

State, presumably including the bed of the Big Horn River and its banks where adjacent to non-Indian tracts, under petitioners' claim that these are not tribally owned (see Points I and II, *supra*). Here, the State asserts that it enjoys exclusive control over non-Indian activities, disputing the ruling below that the Tribe may wholly exclude non-residents from these areas and may regulate resident non-Indians hunting and fishing on fee lands to a limited degree. On the other hand, the United States and the Crow Tribe, having accepted the decision of the court of appeals, no longer challenge the right of non-member residents to hunt and fish on their own lands, subject only to non-discriminatory and reasonable tribal regulation. Nor do we here dispute the State's power to impose regulations more restrictive than the Tribe's on non-member hunting and fishing.[25]

The upshot is that, except for minor quibbles, the only substantial questions presented to this Court with respect to hunting and fishing are: (1) whether the Crow Tribe may exclude—or admit on such conditions as it chooses—outsiders who do not live on the Reservation; and (2) whether the Tribe may prohibit non-member residents from hunting or fishing within the Reservation on fee lands other than their own. These issues could arise if non-Indian landowners sought to commercialize hunting and fishing on their lands. Today, however, the problem centers on the fishery of the Big Horn River, where the State, claiming ownership of the bed and some of the banks, has permitted non-member residents and, more importantly, a large non-resident population, to exploit the resource—an issue which is mooted, we stress, if the Tribe owns the bed and banks, as we assert.[26]

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[25] Because the ruling below essentially protected the hunting and fishing rights of the Crow Tribe within its Reservation and vindicated its authority to exclude strangers, we determined not to seek review here. It does not, of course, follow that the United States (or the Tribe) views the decision of the court of appeals as correct in every particular.

[26] We note that Petitioners' Brief never explicitly refers to outsiders. On the contrary, petitioners repeatedly stress that "Montana law con-

Although they have a common source and substantially overlap, there are two distinct aspects to the Tribe's claim. The first is the special privilege of the members to hunt and fish within a defined area: essentially a *property right*, albeit not necessarily tied to land ownership. Originally exclusive, this privilege is sometimes required to be shared with others, to one degree or another. The principal question here—which we first address—is whether that happened in the case of areas still within the Crow Reservation. Only to the extent that an affirmative answer is given, does the second question arise: what authority does the Tribe retain, as a sovereign government, to *regulate* non-member hunting and fishing within the Reservation. We discuss that issue in due course.

A. The Tribal Property Right

1. Petitioners rightly concede that the Treaty of 1868 conferred on the members of the Crow Tribe the "exclusive use of their reservation" (Pet. Br. 31), which included the right to exclude all non-members from entering, whether for hunting or fishing or any other purpose. At all events, the terms of the reaty, read in light of this Court's precedents, leave no room for argument on that score. See, *e.g.*, *United States* v. *Winans*, *supra*, 198 U.S. at 381; *Alaska Pacific Fisheries* v. *United States*, *supra*, 248 U.S. at 89–90; *Menominee Tribe* v. *United States*, 391 U.S. 404, 406 (1968); *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 683–684. See, also,

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fers upon landowners exclusive hunting and fishing rights," which constitute "a property right," "attached to the fee" and "appurtenant to the ownership of such lands" (Pet. Br. 32, 35, 39). The brief goes on to assail the tribal ordinance because "it deprives non-members of the right to exercise hunting and fishing privileges on their own land" (Pet. Br. 36). This, of course, is no longer an issue in the case, except only with respect to non-resident landowners (see Pet. Br. 39–40). Never do petitioners mention hunting and fishing on State-owned lands, or on the Big Horn River. Nevertheless, given the genesis of this suit, the elaborate argument advanced as to State ownership of the river-bed, and the participation of the Big Horn Rod & Gun Club as a petitioner, we must assume that petitioners *are* asserting a right on behalf of outsiders (neither residents nor landowners) to hunt and fish in non-Indian areas of the Reservation.

United States v. *Sturgeon*, 27 F. Cas. 1357 (D. Nev. 1879); *Mason* v. *Sams*, 5 F.2d 255, 257 (W.D. Wash. 1925). The only open question is whether, and to what extent, the exclusive right of tribal members to hunt and fish within the boundaries of their diminished Reservation has been diluted by subsequent events, notably, the alienation of tracts to non-members and to the State.

For good reason, petitioners do not claim that these alienated parcels are no longer part of the Reservation or that State jurisdiction has replaced federal and tribal authority there. See 18 U.S.C. 1151; *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *United States* v. *Mazurie*, 419 U.S. 544, 554–555 (1975); *DeCoteau* v. *District County Court*, *supra*, 420 U.S. at 427 n.2; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 477–479 (1976). But petitioners *do* assert that, because "Indian title was extinguished" as to the alienated tracts, any tribal claim to enjoy special hunting and fishing rights there, or to regulate hunting and fishing by non-members, has likewise ceased (Pet. Br. 31–32). That is the point of disagreement.

2. The fundamental flaw in petitioners' argument is their insistence that the tribal right to hunt and fish is necessarily dependent on land ownership. Even in the traditional common law, there is no such rule. See, *e.g.*, *Malcomson* v. *O'Dea*, 10 H.L. Cas. 593, 617–618 (1863). And, at all events, it is familiar history that Indian Tribes often retained special hunting or fishing rights, or both, on lands they ceded altogether. See, *e.g.*, *United States* v. *Winans*, *supra*; *Kennedy* v. *Becker*, 241 U.S. 556 (1916); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919); *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Puyallup Tribe* v. *Department of Game of Washington*, 391 U.S. 392 (1968); *Washington Game Dept.* v. *Puyallup Tribe*, 414 U.S. 44 (1973); *Antoine* v. *Washington*, 420 U.S. 194 (1975); *Washington* v. *Fishing Vessel Ass'n*, *supra*. See, also, *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). Obviously, if tribal hunting and fishing privileges can survive the total severance of the underlying lands from Indian jurisdiction, there is nothing incongruous in

the suggestion that a Tribe retained such rights in unceded areas, still within Reservation boundaries, albeit now owned by non-Indians.

We do not suggest that the off-Reservation cases resolve the present controversy. But they do make clear that the Indian right to hunt and fish is not a private landowner's privilege. The right is tribal, not individual, and every member shares it, regardless whether he owns any portion of the affected land. See, *e.g.*, *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 679. What is more, these decisions entirely reject the idea that State property law rules, or even the terms of a federal patent, govern the question. See, *e.g.*, *United States* v. *Winans*, *supra*, 198 U.S. at 382–384. The only relevant inquiry is whether, when the land status changed, the Tribe relinquished its former hunting or fishing rights there. That is a matter to be decided according to the familiar canons of construction in Indian cases, under which the abrogation of treaty rights is never presumed. See *Menominee Tribe* v. *United States*, *supra*, 391 U.S. at 412–413; *Washington* v. *Fishing Vessel Ass'n*, *supra*, 443 U.S. at 690. All the more so in respect of hunting and fishing privileges, so vital to the traditional Indian way of life that Congress has been zealous to preserve them even in its most "assimilationist" periods. See Act of Aug. 15, 1953, ch. 505, Section 2, 67 Stat. 588, 18 U.S.C. 1162(b); 25 U.S.C. 1321(b).

3. Petitioners argue that the Tribe's previously exclusive right to hunt and fish throughout the Reservation became "diluted" in consequence of the allotment policy of the United States (Pet. Br. 31). But they are unable to point to any specific provision of law that accomplished that result. Nor are they clear precisely *when* the alleged dilution occurred. Does it date from the Treaty of 1868 itself, which (as petitioners correctly note, see Pet. Br. 31 n.46) provided for individual allotments (Art. 6, 15 Stat. 650–651, Pet. App. 91–92)? Or from the enactment of the General Allotment Act of 1887, or the Crow Allotment Act of 1920? Or from the actual allotment of tracts to members

of the Tribe under one or the other statute? Or from the alienation of any such tract from the Crow allottee to a non-member or to the State? No answer is satisfactory and each presents special difficulties.

We need only consider the last possibility, seemingly favored by petitioners. It is settled that, notwithstanding Section 6 of the General Allotment Act of 1887 (24 Stat. 390, Pet. App. 102–103), the issuance of a patent in fee to an Indian does not extinguish the special privileges he enjoys as a member of the Tribe residing within Reservation boundaries—including immunity from State taxation and exemption from State law. *Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at 477–479, and cases there cited. The rationale is that the allotment policy has long since been "repudiated" and that "Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation." *Id.* at 479; see 18 U.S.C. 1151. By a parity of reasoning, we cannot assume that such tracts are henceforth removed from tribal authority or wholly closed to the exercise of communal tribal hunting and fishing rights—except as such activities are plainly inconsistent with the residential or agricultural uses to which discrete parcels are devoted. If this is so, it is difficult to appreciate how the mere conveyance of a "fee" tract to a non-member alters the situation, when nothing in either the 1887 Act or the 1920 Act distinguishes between Indian and non-Indian ownership of such lands.

At this day, and especially in respect of tribal hunting and fishing rights, it would be wrong to carry further than the text requires provisions of law as to which Congress itself has confessed error. As the Ninth Circuit observed in *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 663 (1975), in language quoted with approval in *Bryan* v. *Itasca County*, 426 U.S. 373, 389 n.14 (1976), courts "are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an

ongoing relationship." The correct conclusion, we submit, was given by the Montana Supreme Court in the case of another Indian Reservation in the State with a comparable history (*State* v. *McClure*, 127 Mont. 534, 547–548, 268 P.2d 629, 635 (1954)):

> The exclusive right, acknowledged by the treaty, of hunting and fishing in and upon the lands and waters within the exterior boundaries of the Flathead Indian Reservation, imposed a servitude and easement upon every piece of land therein as though specifically described. The future ownership of the lands thereof was well foreseen and provided for.
>
> The Indians retained a right in the land, the right of hunting thereon. The right was intended to be a continuing one against the United States and its grantees as well as against the state and its grantees. No other conclusion would give effect to the treaty. Compare United States v. Winans, supra. It is our opinion that the rights reserved of hunting and fishing upon any and all lands and waters within the exterior boundaries of the Flathead Indian Reservation, by the treaty of July 16, 1855, 12 Stat. 975, have never been alienated, [and] still exist unimpaired * * *.[27]

4. Notwithstanding these difficulties, the court of appeals deemed it appropriate to construe the Allotment Acts as impliedly promising the white settler who purchased land within the Reservation that "bagging of game from his front step [would not be] subject to permission of the Crow Tribal Council" (Pet. App. 15). For the purposes of this case, we accept that ruling as a permissible accommodation. But, in our view, it would be wholly unwarranted to expand this limited exception to other non-Indian areas on the Reservation, or to non-residents who can claim no "justifiable expectations" to participate in Reservation resources (*Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 605 (1977)). Certainly, one who has no connection with the Reservation can assert no right in law or

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[27] See Hobbs, *Indian Hunting and Fishing Rights II*, 37 Geo. Wash. L. Rev. 1251, 1269–1270 (1969).

equity to hunt and fish there simply because, as it happens, some Crow allottees sold their lands to non-Indians. Nor should access be afforded to all comers because the State has purchased a "wedge" within the Reservation boundaries. The hunting and fishing rights of the Crow Tribe cannot so easily "be manipulated out of existence" (*Frost & Frost Trucking Co.* v. *R.R. Comm'n of California*, 271 U.S. 583, 594 (1926)).

5. Finally, we note that the claim of non-members—and especially outsiders—to participate in the Big Horn River fishery is weaker still. If (contrary to our submission) the bed of that river belongs to the State, it is by virtue of the Constitution, not as a consequence of any action of Congress or any purchase by the State. The allotment policy has no bearing on the question. To be sure, the mineral resources of the bed, if any, would be subject to exploitation by the State, under appropriate regulation. But it by no means follows that the fishery in the overlying waters would be open to all citizens. If the United States did not reserve the bed of the Big Horn for the benefit of the Crow, it did, at the least, protect them from the invasion of thousands of fishermen into the heart of their territory. The "solemn[ ]" promise given in 1868 to permit "no persons * * * to enter * * * [or] to pass over" the Reservation territory (Art. 2, 15 Stat. 650, Pet. App. 89) cannot have been so substantially withdrawn *sub silentio* in 1889 when Montana became a State. Nor can those who later purchased tracts within the Reservation, pursuant to the General Allotment Act passed two years earlier, legitimately say that they were promised a share in the river fishery not then, on any theory, held by the State.

B. The Tribal Power of Regulation

Insofar as the Crow enjoy exclusive hunting and fishing rights within the Reservation, Resolution No. 74-05 (Oct. 13, 1973) (Pet. App. 119-120) merely reflects their decision to keep their property to themselves. It serves the same function as a landowner's "posting," notifying all comers that the Tribe does not acquiesce in any trespass

on its rights. Obviously, there is in that no exercise of governmental power over non-members, and neither the Fifth Amendment nor the Indian Civil Rights Act is implicated (see Pet. Br. 36–41). To the extent, however, that the Crow are held no longer to possess exclusive rights as "property," the question arises how far the Tribe may regulate hunting and fishing within the Reservation as the sovereign of that territory.

1. It is unnecessary, at this date, to demonstrate that Indian Tribes retain a measure of sovereignty over their Reservations, including non-Indian activities there. The modern view was announced in *Williams* v. *Lee*, 358 U.S. 217, 223 (1959), and has been consistently reiterated. *E.g.*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690–692 (1965); *United States* v. *Mazurie*, 419 U.S. 544, 558 (1975); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65–66 (1978); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78–630 (June 10, 1980), slip op. 15–17; *White Mountain Apache Tribe* v. *Bracker*, No. 78–1177 (June 27, 1980), slip op. 5–6, 14. It can hardly be doubted that this governmental authority of the Tribes over "their territory" reaches on-Reservation hunting and fishing, traditionally the most vital area of concern and clearly a subject matter in which the Tribe has "a significant interest," whether the activity occurs on Indian-held land or a neighboring tract. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, *supra*, slip op. 16, citing with approval *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906).

It does not, of course, follow that Indian Tribes are wholly unrestrained when acting in their governmental capacity over non-members, or lands or property interests held by others. Thus, the court below held that, exercising regulatory power with respect to hunting and fishing by non-member residents, the Crow Tribe must act reasonably and in a non-discriminatory manner. But, we submit, a different rule applies when a Tribe is seeking to exclude or regulate outsiders who are in no sense "in-

habitants" of the Reservation. As to that aspect of the case, the Tribe, as the government of the territory, has an independent claim to follow an exclusionary policy, or to admit on conditions, which does not turn on the proprietary rights of the members to the resource involved.

2. Historically, Indian Tribes, in their capacity as territorial sovereigns, enjoyed the unusual prerogative of closing their borders to non-members. Except as rights of way have been expressly granted, or as non-members who own land within Reservation boundaries must of course be conceded free ingress and egress to and from their tracts, we know of no basis for altering that rule. Indeed, in *Colville, supra*, slip op. 16, this Court only recently invoked decisions applying the principle. And the same reasoning underlies contemporary rulings by the courts of appeals condoning tribal licensing schemes for outside hunters and fishermen. *Mescalero Apache Tribe* v. *State of New Mexico, et al.*, No. 78–1790 (10th Cir. Aug. 13, 1980); *Eastern Band of Cherokee Indians* v. *North Carolina Wildlife Resources Commission*, 588 F.2d 75 (4th Cir. 1978), petition for cert. dismissed per stipulation, No. 78–1653 (May 22, 1980).

It is inconceivable that this power of excluding intruders can be wholly defeated by the State's purchase of a handful of strategically located Indian allotments. Perhaps the Tribe must tolerate reasonable public uses of State lands within the Reservation. But, unless tribal territorial sovereignty is to become a wholly empty symbol, there must remain authority to say "No hunting or fishing, except by *bona fide* residents or pursuant to special permission." Nor does this amount to impermissible discrimination. Unlike other governments, Indian Tribes are not subject to the strictures of the Constitution. *Talton* v. *Mayes*, 163 U.S. 376 (1896), reaffirmed in *United States* v. *Wheeler, supra*, 435 U.S. at 328–329; and *Santa Clara Pueblo* v. *Martinez, supra*, 436 U.S. at 56, 71. And, as we read it, the Indian Civil Rights Act is satisfied when the Tribe treats alike all persons within the Reservation, and therefore "within its jurisdiction," while preventing entry to outsiders. See 25 U.S.C. 1302(8).

3. Finally, the decision of the Crow Tribal Council to exclude hunting and fishing by outsiders within the Reservation is not without substantial justification in recent experience. The 1973 Resolution, as we have detailed (pages 3–6, *supra*), was enacted against a background of more generous policies which ultimately threatened the fish and game resources of the Reservation. Even a State, subject to the full force of the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment, may take some measures to safeguard the special interest of its citizens in such circumstances. *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U.S. 371 (1978). It would be strange if an Indian Tribe cannot likewise protect its diminished territory, especially "set apart" for the members so that they might preserve their resources and their way of life against the intrusion of the "familiar forces" surrounding them.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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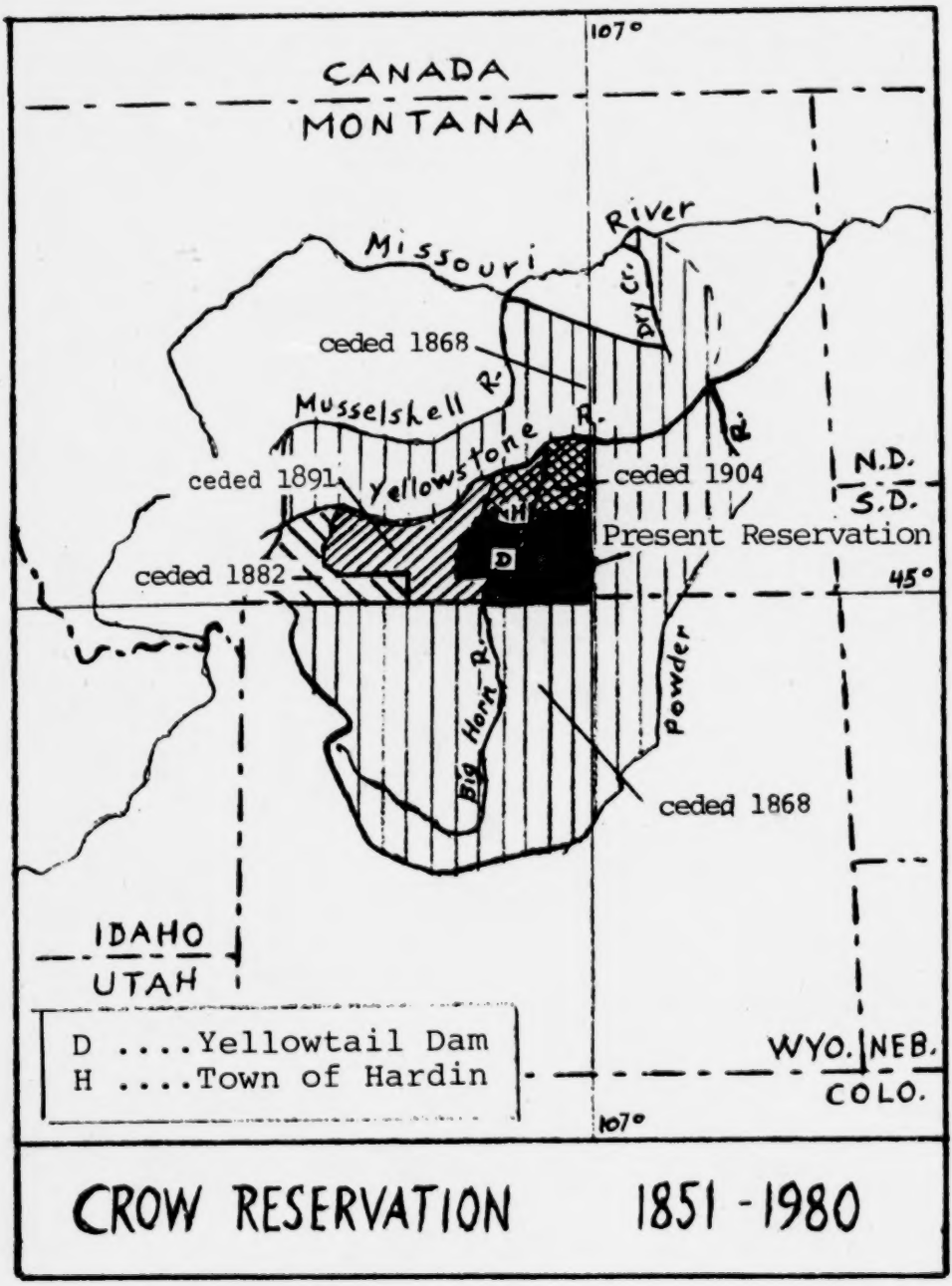
APPENDIX



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents,

v.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTEAD, EARL L. SHERRON, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents,

v.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTEAD, EARL L. SHERRON, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

THE RIVER OWNERSHIP ISSUE

Respondents' transparent attempt to revise this Court's enunciation of the "equal footing doctrine" as applied to Indian reservations should be summarily rejected. See U.S. Br., pp. 13-16. It is firmly established that the strong constitutional presumption against alienation of the beds of navigable waters prior to statehood (see *United States* v. *Oregon*, 295 U.S. 1, 14 (1935); *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370, 373 (1977)) survives the mere creation of an Indian Reservation. *United States* v. *Holt State Bank*, 270 U.S. 49, 55

(1926). Cf. *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620, 634 (1970); *Donnelly* v. *United States,* 228 U.S. 243, 259-262, 264 (1912). There are only two cases in which this Court has squarely faced the issue of whether in fact the United States had conveyed to an Indian tribe the bed of navigable waters in the face of opposing claims made by or on behalf of a sovereign state: *United States* v. *Holt State Bank, supra;* and *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970).[1] It then becomes necessary to further analyze *Holt* and *Choctaw* to ascertain which is most closely applicable to the facts in this case.

(a) *Holt State Bank:* The United States argues: "The upshot is that, as of 1858, there had been no treaty recognition or confirmation of any Chippewa title later known as the Red Lake Reservation." U.S. Br., p. 22; cf. Tr. Br., pp. 12-13. Although it is true that prior to 1863, the United States had not concluded a specific treaty with the Red Lake Band (Treaty of October 2, 1863, 13 Stat. 667), it is solidly established that the United States recognized that the band owned and occupied the land ceded in that treaty long before 1863.

Congressional recognition of Red Laker title was implicit in the Acts of June 19, 1860, 12 Stat. 44, 59, and July 5, 1862, 12 Stat. 512, 528, authorizing negotiations to extinguish "their title" to lands in the State of Minnesota. See also *The Congressional Globe,* Vol. 32, 2091 (37th Cong., 2nd Sess.).

In the negotiations which led up to the Treaty of 1863, there were repeated requests by Alex Ramsey, the United States' negotiator, for the Red Lake Band to "sell" their lands. *Journal of Proceedings Connected With The Negotiation Of A Treaty With The Red Lake and Pembina Bands of Indians*

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[1] Other cases relied upon by Respondents did not squarely face this issue. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918), was decided in Alaskan territorial days. "The reservation was not in the nature of a private grant, but simply a setting apart, until otherwise provided by law" of public property for Indian use. 248 U.S. at 88. The "equal footing doctrine" was not discussed. *Donnelly* v. *United States,* 228 U.S. 243 (1913), just as *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U.S. 77 (1922), did not involve navigable streams. In *Brewer-Elliott Oil & Gas Co.,* the question raised here was specifically preserved. 260 U.S. at 86. In *Donnelly,* United States trust title was actually confirmed by application of the "equal footing doctrine," and this Court recognized California's right to alienate title to the beds of navigable or non-navigable streams. 228 U.S. at 262-264.

(hereafter "Journal"), National Archives List No. 6, Treaty No. 327, Item 16, pp. 15, 27, 38. The Red Lake chiefs at first obstinately refused to discuss price, regaling Ramsey with the story of how they had wrested control of the territory from other tribes, such as the Sioux. Chief Little Rock asserted that the whole area, rivers, forests, fish, and animals "belongs to us." (*Id.*, at 11-12; see also pp. 13, 39 and Little Rock's speech at 43.)[2] Prior to these negotiations, the Red Lake Band had been stopping boats traveling up the Red River and extorting tolls from them. The treaty was intended to secure safe and uninterrupted passage and commerce on the water system through the cession. See, e.g., *The Congressional Globe, supra; Journal, supra,* at 27, 44.

These negotiations resulted in the Red Lake and Pembina Bands selling the United States a vast area of land in 1863. 13 Stat. 671. The lands not ceded continued to be known as the Red Lake Reservation until 1889, when a large portion, including Mud Lake, was ceded to the United States. 25 Stat. 642. Prior to 1889, Indian title had never been extinguished, and the fee was held in trust for the Red Lakers. Implicit in these congressional acts is that prior to 1863, the Band was the exclusive owner and occupant of a vast area of land which encompassed hundreds of square miles of navigable waters. It was this prestatehood ownership status which this Court recognized in *Minnesota* v. *Hitchcock*, 185 U.S. 373, 389 (1902) (compensable "sacred" title), and *United States* v. *Holt State Bank, supra,* 270 U.S. at 58.[3]

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[2] Compare with the similar claims made by the Crow both in 1867 and 1873. (Crow Brief, pp. 19-24) Despite these claims of ownership, this Court, in *Holt*, was not persuaded to depart from the "equal footing doctrine."

[3] The courts have consistently acknowledged that the Red Lake Band owned and was entitled to the exclusive possession of their lands prior to Minnesota statehood. See *Chippewa Indians* v. *United States*, 301 U.S. 358, 360-362 (1936); *Chippewa Indians* v. *United States*, 80 Ct.Cls. 410, 424-425, 437, 442, 464, 466, 467 (1935); *United States* v. *Minnesota*, 466 F.Supp. 1382, 1383 (D.Minn., 1979), aff'd sub. nom. *Red Lake Band of Chippewa Indians* v. *Minnesota*, 614 F.2d 1151 (8th Cir.), cert. den. 49 U.S.L.W. 3270 (1980). The executive branch has also recognized Chippewa title to northern Minnesota long before statehood. See e.g., Annual Report of the Commissioner of Indian Affairs, 1849-1850, pp. 9-11, 94; Annual Report of the Commissioner of Indian Affairs, 1863, pp. 429, 430. See also documents cited in *Chippewa Indians* v. *United States*, *supra*, 80 Ct. Cl. at 424-425, 464.

Despite the Red Lakers' right to exclusive ownership of their lands, there was no evidence that the United States was departing from its established rule that title to beds of navigable waters would be conveyed to the state upon admission. *Holt*, at 58-59. It was clear that because the fee to the navigable water had never been conveyed prior to statehood, it passed to Minnesota in 1858—a factual situation directly apposite to this case.

(b) *Choctaw:* In *Choctaw*, this Court was confronted with a unique fact situation totally different from this case. In 1830 and 1835, when the treaties with the Choctaw were negotiated, the "equal footing doctrine" had not yet been enunciated by this Court. By 1868, that doctrine was fully entrenched. *Martin* v. *Waddell*, 41 U.S. 366 (1842); *Pollard* v. *Hagan*, 44 U.S. (3 How.) 212 (1845). It is presumed Congress was cognizant of the doctrine and was acting to implement it when it approved the 1868 treaty. See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 587, 593, n. 13 (1977), ("surrounding circumstances" to be considered in ascertaining intent).[4]

Additionally, the Choctaw and Cherokee were moved to a remote area in which no territories had been established and in which no states were then contemplated. In 1868, the Territory of Montana had been established with a territorial capital and defined country boundaries, some of which included the to-be-created Crow Reservation.[5]

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[4] Cf. *Confederated Salish & Kootenai Tribes* v. *Namen*, 380 F.Supp. 452, 461-466 (D.Mont., 1974), aff'd 534 F.2d 1376 (9th Cir.), cert. den. 429 U.S. 929 (1976) ("*Namen I*"); *Confederated Salish & Kootenai Tribes* v. *Namen*, 6 *Indian Law Reporter*, F-161 (D.Mont., September 19, 1979) ("*Namen II*"). The position taken by the United States is incongruent with their position in *Choctaw*, *supra* (United States' amicus brief, p. 12): "The 'equal footing doctrine' is generally traced to the decision in *Pollard* v. *Hagan*, 3 How. 212, a decision rendered in 1845—ten years after the treaty with the Cherokees was concluded and fifteen years after the treaty with the Choctaw. Thus, it is immediately doubtful that the silence of the treaty-makers on the precise question of ownership of the riverbed can fairly be interpreted as a conscious decision to reserve these lands to assure the 'equal footing' of a future State."

[5] The United States brief in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, stressed the fact that there was no "demonstrable expectation that the lands involved will ultimately form part of a state" as a distinguishing feature from *United States* v. *Holt State Bank*, *supra*. United States amicus brief, p. 16.

The treaties involved, of course, were significantly different, for in the treaties of 1830 and 1835,[6] the United States conveyed the lands to the tribes in fee simple; whereas, in the 1868 treaty, the fee, as in *Holt*, had been withheld.[7] This Court recognized in *Choctaw:*

> "that if title remained in the United States, it passed to Oklahoma upon admission to the Union as an incident of statehood. The sole question is whether the treaty *grants* from the United States *conveyed* title." (397 U.S. at 628 (emphasis supplied)).

The Choctaw and Cherokee treaties established those tribes as full sovereigns of their territories and guaranteed them that they would never become a part of any state or territory. It was this guarantee which led the United States to argue in *Choctaw* that:

> "these tracts assured the Indians a sovereign autonomy that, by necessary parity of reasoning, must be taken as passing title to the riverbed to them as the authority that was constituted in lieu of a prospective state." (United States' amicus brief, p. 17; see also pp. 7, 9, 18, 21, and 25.)

Petitioners (Br., pp. 20-23) and the Chickasaw Tribe (Br., pp. 24-32) made similar arguments. No such promises were made to the Crow.[8] The Crow treaty provisions recognized exclusive federal authority to arbitrate disputes, sanction non-members, pass laws governing tribal lands, and the Indians agreed to submit themselves to schooling and "civilization." Arts. 1, 5, 6, 7; App. to Pet., pp. 88, 90-92. The United States, in *Choctaw*,

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[6] Treaty of Dancing Rabbit Creek, September 27, 1830, 7 Stat. 333; Treaty of New Echota, December 29, 1835, 7 Stat. 478; F&G Exhibits 67 and 68.

[7] This cardinal distinction between *Holt* and *Choctaw* was repeatedly emphasized throughout petitioners' and amicus briefs in *Choctaw*. United States' amicus brief, pp. 6, 8, 16, and 21; petitioner's brief, pp. 27-32.

[8] Although the argument is advanced that the disclaimer clause in Montana's Enabling Act was tantamount to the guarantee to the Choctaw, this Court has held to the contrary. *Draper* v. *United States*, 164 U.S. 241, 243 (1896). Cf. *Organized Village of Kake* v. *Egan* 369 U.S. 60, 67 (1962); *United States* v. *McBratney*, 104 U.S. 621 (1881).

recognized that the *Holt* rule applied to Indian reservations and would apply to *Choctaw* but for the marked distinguishing factors listed above. It is the very absence of those distinguishing factors which renders *Choctaw's* conclusions inappropriate here.

(c) *Exclusivity:* The Repondents argue that ownership of the Big Horn River in the State would violate tribal guarantees of exclusivity. If this is true, then the river cannot be subject to a navigational servitude, because one cannot have exclusivity when surcharged with a servitude which, by definition, includes (1) free navigation and commerce, and (2) the right to enjoy the public fishery. *Shively* v. *Bowlby,* 152 U.S. 1, 17 (1894); *Martin* v. *Waddell, supra,* 41 U.S. at 409, 414.[9] The United States has acknowledged the burden of this navigational servitude on the Big Horn River. United States' Answers to Interrogatories no. 37, 40-42; 1 J.App., pp. 3-4. Of course, with the navigational servitude, there is the dilution of exclusivity which renders any argument predicated upon exclusivity facially unsupportable.

(d) *Description:* The fact that treaty and legislative descriptions included the "mid-channel" of rivers does not evidence an intent to depart from the "equal footing doctrine." In *Holt,* hundreds of square miles of navigable waters were wholly within the Red Lake Reservation. 270 U.S. at 58. Cf. *Martin* v. *Waddell, supra,* 41 U.S. at 414; *Puyallup Tribe, Inc.* v. *Washington State Game Dept.,* 433 U.S. 165 (1977). Political control over members and assurances that tribal water and fishing rights attach to the rivers fully explain the descriptions but do not go so far as to evidence an intent to divest Montana of the equality with which the thirteen original colonies were clothed. If, indeed, descriptions control intent, then Montana, and its amici states,[10] would be divested of hundreds of miles of navigable waters. See, e.g., Royce, *Indian Land Cessions in the United States,* 18th Annual Report of the Bureau of American

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[9] This public right of fishery has been withheld while an area reserved for Indian use was still in a territorial condition under federal regulations to secure to the Indians their traditional food and economic interest in the fish resource (*Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918))—a fact situation not present here.

[10] See amici briefs for State of Idaho, et al., and State of Washington.

Ethnology, Pl. CXLVI, No. 374, Pl. CXLVII, No. 623; No. 604, No. 695. As developed below, such a result would be anathema to well-entrenched congressional policies.[11]

(e) *The Importance of the Ownership Issue:* Although it is true a dispute over fishing and hunting regulation was the catalyst for this litigation, the issue here is not so modest. The nature of a state's interest in navigable waters "lie in the protection of navigation, fisheries and similar purposes." *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977).[12]

By enacting the McCarran Amendment, Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. § 666, Congress waived both federal and tribal sovereign immunity so that water rights could

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[11] Lower court decisions which have held reservation descriptions included beds of navigable waters are either distinguishable or entirely fail to apply the principles of the "equal footing doctrine." In *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir., 1942), the *Holt* decision and the "equal footing doctrine" were neither cited nor discussed in the opinion or in any of the appellate briefs. Since *Rochester*, the federal courts have felt bound by that decision, but the issue of lake ownership has been challenged and remains alive. *Confederated Salish & Kootenai Tribes* v. *Namen*, CV-2343 6 *Indian Law Rptr.* F-161 (D.Mont., September 19, 1979), on appeal to the Ninth Circuit. *Moore* v. *United States*, 157 F.2d 760 (9th Cir., 1946), relied heavily upon the dependence of the Indians upon the tribal fishing and hunting enterprises to support its conclusion that the waters were within the reservation, distinguishing *Holt* on that ground (157 F.2d at 765). In the absence of such a showing, the same court has withheld from an Indian tribe title to navigable waters. *Skokomish Indian Tribe* v. *France*, 320 F.2d 205 (9th Cir., 1963). If the rationale of *Moore*, *Alaska Pacific Fisheries* v. *United States*, *supra*, and *Skokomish* were applied to the facts in this case, the fact that the Crow have evidenced little interest in the fishery would dictate that the ownership issue be decided in favor of the State. See also *United States* v. *Stotts*, 49 F.2d 619, 620-621 (9th Cir., 1930). It is also evident in reading these decisions that in almost each instance, the court was not required to address the ownership issues. The rights of the Indians, whether in the fishery or the water, could have been adequately protected without departing from the "equal footing doctrine." (See, e.g., Petitioners' brief, pp. 19-20.) The "upshot" is that closely scrutinized, the lower court decisions give little assistance in resolving the ownership issue in this case.

[12] Montana's interests on the Big Horn not only involve a property interest (70-1-202, M.C.A., Pet. brief, p. xiii) but also include water quality (75-5-101, et seq., M.C.A.); appropriation and use of water (85-2-301, et seq.

(footnote continues)

be adjudicated under state water laws. *Colorado River Conservation District* v. *United States, ("Akin")* 424 U.S. 800, 811-812, 819 (1976). In light of Congress' deference to state adjudicatory policies, it would appear inconsistent to then piecemeal out the ownership of some of our major streams to incomplete sovereigns apparently intent upon disrupting unified state schemes (*Akin, supra,* 424 U.S. at 819) and implementing their own (*Colville Confederated Tribes* v. *Walton,* (9th Cir., 1980) ___F.2d ___, Slip Op. 15).[13]

The Big Horn River is a tributary to the Yellowstone River, the last major "free flowing" stream in the United States.[14] The State has just completed a protracted administrative hearing under its Water Reservation Act (85-2-601, et

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(footnote continued)

and 401, et seq., M.C.A.); stream protection (87-5-501, et seq., M.C.A., 75-7-101, et seq., M.C.A.); flood plain and flooding management (76-5-101, et seq., M.C.A.); public water supplies (76-5-101, et seq., M.C.A.) (Articles II and V.), and honoring its commitments under the Yellowstone River Compact (85-20-101, et seq., M.C.A.). This compact specifically delimits each member state's interest in the Big Horn River. Congressional approval of the compact was given October 20, 1951, 63 Stat. 152. See Articles II and V. It then became a federal law. *Petty* v. *Tennessee-Missouri Bridge Com.*, 359 U.S. 275, 278-279 (1959); *League to Save Lake Tahoe* v. *Tahoe Reg. Plan. Agcy.*, 507 F.2d 517, 523 (9th Cir., 1974).

[13] Congress has consistently exhibited an intent to leave water appropriation and regulation in state hands. (Act of March 3, 1891, 26 Stat. 1095, 1097, as amended 43 U.S.C. §946; Federal Reclamation Act of 1902, 32 Stat. 388; see 43 U.S.C. § 383; Federal Power Act of 1920, 41 Stat. 1068, 16 U.S.C. §802, et seq.; Flood Control Act of 1944, 58 Stat. 887, 33 U.S.C. §701-1; see also *State of California* v. *United States,* 438 U.S. 645, 664-672, 678 (1978); *United States* v. *New Mexico,* 438 U.S. 696, 702 (1978), n. 5: "See Hearings on §1275 before the subcommittee on Irrigation and Reclamation of the Senate Committee on Interior & Insular Affairs, 88th Cong. 2nd Sess., 302-310 (1964) (App. B, supplementary material submitted by Sen. Kuchel), listing 37 statutes in which Congress has expressly recognized the importance of deferring to state water laws * * *.")

[14] Posewitz, *No Longer Just a Dream,* Montana Outdoors, March/April, 1979, pp. 35, et seq. The Big Horn River contributes, on an average annual basis, 2,873,000 acre feet a year (afy) to the Yellowstone. U.S. Geological Survey Water Supply Paper—Water Resources Data— Montana—Water Year 1978, p. 396. The confluence of the Big Horn and Yellowstone Rivers is downstream from Billings, Montana, and measurements of the Yellowstone River reflect a net increase between Billings and Miles City, after deducting other major tributaries, of 2,971,400 afy. *Id.*, at 352, 499, 512.

seq., M.C.A.), which, *inter alia,* reserved large amounts of water from the Big Horn for water quality, municipal, agricultural, and fish and game purposes. Clark, *The Reservation Challenge,* Montana Outdoors, March/April, 1979, p. 29 et seq.; Order of Board of Natural Resources of Yellowstone River Basin Reservation, Before the Board of Natural Resources and Conservation of the State of Montana, January 29, 1979. If the title to the Big Horn is indeed vested in the Tribe, then will they argue they can supplant the State's role for overall planning as to that stretch of the Big Horn within the reservation as another tribe has done? *Colville Confederated Tribes* v. *Walton, supra,* Slip Op. at 15. Obviously, vesting Indian tribes with title to the vast stretches of navigable waters within or bordering existing reservations will spawn a plethora of jurisdictional contests. This Court has indicated that Indians should not exercise such draconian jurisdiction over non-Indians. *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978). It is for that reason also and to avoid the checkerboard jurisdiction over many of our navigable waters that title to the Big Horn was vested in the State.

THE HUNTING AND FISHING ISSUE

As in recent cases before this Court, this case involves conflicting claims between Indians and non-Indians to a wildlife resource. See *Washington* v. *Fishing Vessel Association,* 443 U.S. 658 (1979); and *Puyallup Tribe* v. *Washington Game Department,* 433 U.S. 165 (1977) *("Puyallup III").* In these latter two cases, however, and in all of the prior Indian hunting and fishing cases to reach this Court, the challenge was to a state regulatory system.[15] That system, it was claimed, allowed the Indians too little and the non-Indians too much, thereby violating the Indian treaty rights to that resource.

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[15] *Ward* v. *Race Horse,* 163 U.S. 504 (1896); *United States* v. *Winans,* 198 U.S. 317 (1905); *New York ex rel. Kennedy* v. *Becker,* 241 U.S. 556 (1916); *Seufert Bros. Co.* v. *United States,* 249 U.S. 194 (1919); *Tulee* v. *Washington,* 315 U.S. 681 (1942); *Puyallup Tribe* v. *Department of Game ("Puyallup I"),* 391 U.S. 392 (1968); *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968); *Department of Game* v. *Puyallup Tribe ("Puyallup II"),* 414 U.S. 44 (1973); *Antoine* v. *Washington,* 420 U.S. 194 (1975).

This case is sharply different. We are here concerned with a claim of power by a *tribal government*—not a state—to regulate and allocate the resource. The tribal government claims that power over non-Indians and Indians alike. The claim is that the tribal government itself has the power to decide who shall get what, and how much, and not that the state has allowed the Indians too little.

Glaringly absent from the record in this case is any evidence that the restrictions which the Tribe wishes to place upon non-Indian hunting and fishing on non-Indian lands are in any way necessary to conserve the resource for tribal needs.[16] Further, there is no evidence as to what those tribal needs might be. Rather, the claim is simply that the Tribe has the power to decide unilaterally that, with one limited exception, it can keep the resource entirely to itself, even when that resource is found on non-Indian lands.[17]

What is the source of the Tribe's power to make that decision? The Solicitor General and the Tribe both offer two sources, the first being proprietary in nature, and the second governmental. The Solicitor General, however, emphasizes the first and the Tribe emphasizes the second—undoubtedly with an eye on future assertions of tribal power over non-Indians on

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[16] The record contains *claims* that these restrictions are necessary for conservation. See, *e.g.*, U.S. Br., pp. 4-6. But there is no evidence or findings of fact by the district court to support these claims. The Tribe's professed concern about conservation is belied by the fact that *to this day it has not enacted any fish and game code delimiting seasons, bag limits, or sex*. See, *e.g.*, Tr. 255, 324-326. Moreover, the pressures placed upon the fish and game resources by the non-member do not threaten that resource as claimed by the United States (U.S. Br., p. 41). See, *e.g.*, Tr. 263, 269.

[17] That exception, of course, involves the non-Indian *resident* landowner. Though the Tribe, under the decision of the court below, does not have the power to completely prohibit that owner from hunting and fishing on his own lands, it can still regulate that hunting and fishing, and it can completely prohibit him from accepting his non-Indian neighbor's invitation to hunt or fish on that neighbor's land. Also, it can completely prohibit the landowner from hunting and fishing even on his own land unless he actually resides there.

Though both the Tribe and the United States here fail to contest the validity of the resident landowner exception, they make it clear they do so grudgingly and profess to reserve the right to contest that exception in subsequent actions. Tr. Br., pp. 32, 38; U.S. Br., p. 37.

non-Indian lands in additional areas such as land use or taxation. Tr. Br., pp. 35-43. We take up each of the two proffered sources in turn.[18]

(a) *The Proprietary Source:* The starting point of the argument is most succinctly stated by the Tribe:

> "[T]he Tribe has an exclusive right, in the nature of a profit a prendre, to hunt (and fish) throughout the reservation, regardless of whether the locus is on trust or fee [non-Indian] land." (Tr. Br., p. 31)

Two questions here arise. First, does that exclusive right extend to non-Indian lands, as the Tribe here asserts? And secondly, if so, may the Tribe enforce that right directly against the non-Indians hunting or fishing on non-Indian lands? Or, alternatively, may it only enforce that right by the same way that the Indian tribes and the United States enforced Indian treaty rights against the Washington State regulatory agencies in *Washington* v. *Fishing Vessel Association, supra, i.e.,* by requiring those agencies to adjust their regulatory systems to fully accommodate those rights?

We first take up the claim of an exclusive right to hunt and fish even on non-Indian lands. Unquestionably, with one exception,[19] the Crow once had an exclusive hunting and

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[18] The power here claimed by the Tribe over non-Indians is a newly discovered power, even for the Crow Tribe itself. Until it adopted Resolution No. 74-05 in 1973, it never attempted to exercise any power over hunting and fishing by non-Indians on non-Indian land. And the district court so found as a fact, despite assertions by the United States and the Tribe to the contrary at trial. (Pet. App., pp. 52, 53) Thus, there existed no "tradition of sovereignty" over hunting and fishing. Cf. *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* U.S. , 65 L.Ed.2d 10 at 46 (1980) (Rehnquist, J., concurring and dissenting.) Further, as the district court also found, the stocks of fish and upland game birds which have been introduced into the reservation have been supplied by either the State or non-Indian organizations, not by the Tribe or the federal government. Pet. App., pp. 38, 39. The policy adopted by the Tribe in Resolution No. 74-05 has, of course, brought these stocking programs to a standstill.

[19] The one exception being the public right of fishery created by the navigational servitude. See p. 6, *supra.*

fishing right, reservation-wide. But it existed not by reason of any specific treaty language relating to hunting or fishing—no such language exists—but rather, by reason of language in Article II of the Second Treaty of Fort Laramie (Pet.App., pp. 88-96, 15 Stat. 649). That language "set apart for the undisturbed use and occupation of the Indians" the land described therein.[20]

But as this Court made clear in *Puyallup III, supra,* 443 U.S. at 177, that language no longer applies to land which has been alienated to non-Indians. This is the critical point that the Solicitor General and the Tribe carefully ignore.[21]

True, Indian fishing and hunting rights may sometimes survive alienation of the land to non-Indians. Indeed, this was precisely the situation in *Puyallup III, supra.* But those rights survive only because there was language in the treaty which

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[20] The Solicitor General states: "The fundamental flaw in petitioners' argument is their insistence that the tribal right to hunt and fish is necessarily dependent on land ownership." (U.S. Br., p. 34). This misconceives our argument. Our argument is that a treaty right to hunt and fish must be traceable to some treaty provision such as Article II, quoted above. But if Article II no longer applies to a specific piece of land, by reason of its alienation to a non-Indian, the hunting and fishing rights formerly existing with respect to that land no longer apply as well.

We should also note that Article IV of the Treaty does expressly address hunting rights. But those rights extend only to "unoccupied lands of the United States," outside the reservation boundaries (Pet. App., 90). Thus, if the treaty right asserted here exists, it must be by reason of the continued vitality of Article II, not Article IV.

There is here no dispute that the alienation of reservation lands to non-Indians has diluted the exclusive hunting and fishing rights which the Crow once held reservation-wide under Article II. For the "resident landowner" exception to the validity of Resolution No. 74-05, as established by the court below, is not here contested. See n. 17, *supra.* The controversy is over the extent of that dilution and the legal principles pursuant to which that dilution has occurred.

[21] In relying upon *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968), they ignore another critical point (U.S. Br., p. 34; Tr. Br., p. 34). Though tribal hunting and fishing rights there survived termination of the reservation, as intended by Congress, those rights applied only to land which was still in tribal ownership. There was no assertion that they applied to any non-Indian lands, and the question of non-Indian rights was specifically reserved. *Id.,* at 409, n.10.

said they survive. And that language, now familiar to this Court from a host of cases,[22] guarantees the Indians fishing rights in their usual and accustomed grounds and stations, in common with the non-Indian. That language, we must stress, is not found in any treaties with the Crow.[23] Thus, the language of the Second Treaty of Fort Laramie provides no basis for Indian hunting and fishing rights on non-Indian land at all, either exclusive or in common.

At this point, we must make an important distinction. Our submission does not mean that the Crow's treaty rights may have no impact whatsoever on non-Indian hunting and fishing on non-Indian lands. Wildlife, like rivers and streams, have little respect for property lines and reservation boundaries. Thus, for example, an upstream off-reservation landowner cannot withdraw from a stream all the water he wants and thereby deprive a downstream reservation Indian of the water he needs for cultivating his land. Under *Winters* v. *United States,* 207 U.S. 564 (1907), there is an implied treaty right to the amount of water necessary to fulfill the purpose of the reservation—*e.g.*, providing an agricultural base for the Indian landowner.

Similarly, one of the purposes of establishing the Crow reservation was, unquestionably, to provide the Crows a place on which to continue their historical pursuit of hunting. And if the State of Montana allowed non-Indian hunters on non-Indian land within the reservation to hunt without limit and

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[22] Those cases include, in addition to the *Puyallup* series, *United States* v. *Winans,* 198 U.S. 371 (1905); *Tulee* v. *Washington,* 315 U.S. 681 (1942); and *Washington* v. *Fishing Vessel Association,* 443 U.S. 658 (1979). Cf. *Antoine* v. *Washington,* 420 U.S. 194 (1975).

[23] In contrast, the Treaty of Hellgate, 12 Stat. 975 (1855), involved in *State* v. *McClure,* 127 Mont. 534, 268 P.2d 629 (1954), did contain this language. After finishing in Washington Territory, Governor Stevens negotiated in western Montana as well. We should also note that the broad language quoted by both the Solicitor General and the Tribe from that case (U.S. Br., p. 35; Tr. Br., p. 33) was concurred in by only two members of the five-member Montana Supreme Court. See 268 P.2d at 636. The majority of the court realized that the writer was going too far—as indeed he was.

thereby reduce the game available levels, this may result in a violation by the state of the Crows' implied treaty rights.[24]

But that is not the claim now presented to this Court by the Tribe. The claim here is that when that resource is found within the reservation boundaries, however large or small it may be, it belongs entirely to the Tribe, even though it may be found on non-Indian lands. Neither the language of the treaty nor the decisions of this Court support any such claim.

Two final considerations: No claim is made by the Tribe or the United States that a tribal member could ignore fencing or posting by the non-Indian landowners within the reservation. U.S. Br., p. 31. And for good reason; see *Antoine* v. *Washington,* 420 U.S. 194, 207, n. 11 (1975); and I, J.App., pp. 71-72. It would be a strange result indeed if the non-resident owner could prevent the Indians from hunting on the non-Indian land, while that owner could not himself hunt or fish on that same land or allow his friends and neighbors to do so. If the Tribe really has the exclusive rights it here claims, under any sort of logic, posting and fencing should not be able to defeat them. Lastly, the exclusive rights here claimed by the Tribe are not rights which Congress has recognized or to which it has attached any importance. This is shown by the legislative history of 18 U.S.C. § 1165 outlined in our opening brief, which illustrates that Congress eschewed the opportunity to expand § 1165 to include "Indian country." See also Idaho's Amici Br., pp. 18-21.

Thus, Congress deliberately gave no protection whatsoever to the supposed right being asserted here. This Court should do the same.

(b) *The Governmental Source:* Even if, contrary to our submission, the Tribe has exclusive hunting and fishing rights, reservation-wide, it would require some governmental body to

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[24] What the standards for quantifying these acceptable levels might be, of course, is as yet unclear. They might be merely subsistence standards, or they might be a certain percentage of the resource. Cf. *Washington* v. *Fishing Vessel Association, supra.* That issue is not before the Court, and, we trust, never will be. The reason being, of course, the fact that both Montana and Wyoming have strict conservation codes in contrast to the Tribe, which has none.

enforce those rights against non-Indians. In prior hunting and fishing cases, of course, that body has been a state agency, albeit sometimes acting under order of a federal court. Cf., *Washington* v. *Fishing Vessels Association, supra.*

Here, it is asserted, the proper governmental body to enforce those rights is the Tribe itself. Indeed, the argument is that even if the Tribe does not have the proprietary rights that it here claims; nevertheless, as a *sovereign governmental entity,* it can reserve all the wildlife found within its reservation for its own members, with, of course, the exception of the resident landowner.

The tribal governmental power here claimed over non-Indians, of course, extends well beyond the regulation of hunting and fishing. It would extend, as the Tribe itself acknowledges, to zoning of non-Indian lands (Tr. Br., pp. 37, 40, n.32) and to taxation of non-Indians when on those lands (Tr. Br., pp. 40-42). For the Tribe, the non-Indian who moves onto his own land within an Indian reservation is little different from the person who moves to a foreign country; he is subject to a new sovereign and to a whole new set of laws. Moreover, he cannot participate, through the ballot box, in that new sovereign's governmental processes.

This raises, of course, a very troublesome constitutional problem. That problem is best put into focus by the decision in *Holt Civic Club* v. *Tuscaloosa,* 439 U.S. 60 (1978). Under challenge in *Holt* were the "police jurisdiction" statutes of Alabama. These provide generally that persons residing within a certain distance outside a city's boundaries are subject to the city's police, sanitary, and business-licensing powers and to the jurisdiction of the city's criminal courts. Persons within that zone, however, cannot vote in city elections.

For the majority, two factors, in combination, were decisive in saving the statutes. First, the persons attacking the statutes did not reside within the city boundaries. Hence, recent voting rights cases, which had invalidated statutes disenfranchising otherwise qualified residents within the governmental body, were inapplicable. Secondly, the city's jurisdiction within the zone was, in the view of the majority, quite

limited. As pointed out in Mr. Justice Rehnquist's opinion for the court, the situation was not one in which * * * a city has annexed outlying territory in all but name * * * ." 439 U.S. at 72, n. 8. The city, for example, was not empowered to exercise:

> "* * * the vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses." *Id.*

For the three dissenting justices, neither of these two factors would have saved the statutes. 439 U.S. at 79-88.

Under the constitutional tests applied by the majority, and *a fortiori* under more stringent tests of the dissent, the governmental powers which the Tribe here asserts over non-Indians cannot be upheld. A comparison of the situation of the plaintiffs in *Holt* with that of the non-Indian resident on the Crow reservation shows why.

Neither of the two factors which saved the statutes in *Holt* are applicable to the case of that non-Indian. It is precisely because he resides within the reservation boundaries, and not outside, that the Tribe claims power as a sovereign over him. And further, that power includes the very sorts of governmental authority—zoning, taxation, and presumably eminent domain—which were missing from the Alabama statutes. As *Holt* demonstrates, the broader the claim of governmental power, the more serious the constitutional problem becomes. And the claim of the Tribe here is broad indeed—it is that of a third type of sovereign government, separate from the states and the federal government.

Nor does it solve this problem to invoke—as does the Solicitor General—*Talton* v. *Mayes*, 163 U.S. 376 (1896), or *United States* v. *Wheeler*, 435 U.S. 313 (1978). See U.S. Brief, p. 40. True, in some instances, Indian tribes are not "subject to the strictures of *** the Constitution." U.S. Brief, p. 40.[25] *But*

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[25] The parallel strictures of the Indian Civil Rights Act are directly applicable to the Tribe itself. See, 25 U.S.C. §1302(8). This is a second reason why any reliance upon *Talton* and *Wheeler* is misplaced. We note, without comment, the suggestion of the Solicitor General that these statutory strictures can be avoided by the simple expedient of forbidding non-Indians

(footnote continues)

the United States is subject to those strictures. And it is *federal law, i.e.,* a treaty, which supposedly provides the basis for this claim of tribal governmental power over non-Indians. Cf., *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). Certainly, the relationship between the Crow Tribe and the United States is markedly closer than the relationship between the private restaurant owner in *Burton* and the State of Delaware.

No constitutional problem is presented, of course, if the inherent power of Indian tribes over non-Indians is confined to the power to exclude them from Indian lands and to condition their entry upon those lands. Those powers have long been exercised by Indian tribes and are not strikingly different from those exercised by any landowner.[26]

Nor is a constitutional problem presented when an exercise of federal power over non-Indians is made dependent upon the interests and desires of the Tribe. The provisions of 18 U.S.C. § 1165 are an example, as are the provisions of 18 U.S.C. § 1161, involved in *United States* v. *Mazurie,* 419 U.S. 544 (1975). So also is 42 U.S.C.§ 7474, relating to determination of air quality standards for reservation lands. In each of these examples, the subject matter is very specific and narrow and would thus, we believe, certainly pass even the stringent constitutional tests of the dissenters in *Holt,* as the holding in *Mazurie* itself demonstrates. 419 U.S. at 457, 458.

This case is the proper one, we suggest, for this Court to put an end to the claim of Indian tribes to sovereign powers over non-Indians, by explicitly confining tribal powers to tribal *self*-government. In *Oliphant* v. *Suquamish Tribe,* 534 U.S. 191

(footnote continued)

to cross the reservation boundaries and thus prevent them from coming "within its [the Tribe's] jurisdiction," (U.S. Br., p. 40) despite the United States and the Tribe's invitation to enter and reside there.

[26] The tribal power to exclude is not confined to tribal lands but undoubtedly extends to lands owned by its individual members, *i.e.,* allotted lands. Thus, the power is broader than that of the ordinary landowner and, for this reason, can justifiably be viewed as a governmental, rather than just a proprietary, power. But we did not see this as raising any constitutional problem.

(1978), it took the first step in that direction. Applying the rationale of *Oliphant*, it should take the final step here.[27]

This does not mean that reservation Indians are without protection when non-Indians endanger their legitimate interests. They have the power to exclude them from Indian lands, and Congress has hardly been reluctant to protect those interests, even from non-Indians on non-Indian lands, when the Indians can show they merit protection.

But Congress has never granted recognition to the claims of sovereign power over non-Indians asserted here. Nor should this court.

THE DUE PROCESS AND EQUAL PROTECTION ISSUES

Neither the Crow Tribe nor the United States has met Montana's strong argument that Tribal Resolution 74-05 violates due process and equal protection rights of non-Indians. These rights are much too important to simply ignore, as Respondents would apparently have this Court do. Resolution 74-05 is not the act of an independent sovereign nation. Nor is it merely an act to regulate the internal affairs of the Crow Tribe. Rather, the resolution is a bold attempt to confiscate property rights because of ethnic differences which is implicitly sanctioned and actively supported by the United States. As such, it violates basic constitutional principles and cannot be upheld.

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[27] In oral argument in *Oliphant*, the following colloquy occurred:

"Question: [by Justice Rehnquist] Mr. Ernstoff is there any way of distinguishing your case from civil jurisdiction of the Tribe so that the court could, in a principled way, say there was criminal jurisdiction here but not civil jurisdiction?

Mr. Ernstoff [counsel for the Suquamish Tribe]: That is a very interesting question, Your Honor. I really do not know that they can, to be honest with you. * * * To intellectually honest, I do not think you really can and I do not think that you should. * * *" (Transcript of Oral Argument)

That "very interesting" question remains critical here. For the reasons given in our prior brief (Pet.Br., pp. 34, 35) and the various briefs of *amicus curiae* (*e.g.*, Brief of State of Washington, pp. 18-21), we agree with counsel's answer. The rationale of *Oliphant* is applicable on the civil as it is on the criminal side. Neither the Tribe nor the Solicitor General make any serious effort to show otherwise.

Perhaps, it is true that at one time Indian tribes, as sovereign nations, had the power to rule without regard to the rights of due process and equal protection. But that time is long past. Their acceptance of the protection of the United States government and their dependence upon it to enforce their rules necessitates that any sanctions they seek to impose upon non-Indians be carefully drafted to comport with the United States Constitution.

In *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961), this Court struck down racially discriminatory policies of a "purely private" party, where it found substantial state involvement. In so doing, the Court noted:

> "* * * the State has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."

This language is remarkably applicable to the actions of the United States government in the instant case. The Crow Reservation was created by the Treaty of 1868 negotiated between the tribe and the United States government. Lands within the reservation were subsequently opened for sale to non-Indians, by an act of the United States. General Allotment Act of 1887, 24 Stat. 388, Pet. App., pp. 97-104; Crow Allotment Act of 1920, 41 Stat. 751, Pet. App., pp. 105-118. Even more directly, Tribal Resolution 74-05 was submitted for approval to the United States. C-T Ex. 71-rr; J.Ap. 92. The resolution itself was enforced by wardens deputized by the Bureau of Indian Affairs. Tr., 252-253. Indeed, the very fact that the United States brought this action to vindicate the Tribe's alleged "exclusive treaty right" to hunt and fish (J.App., p. 11, para. 3) dramatically highlights federal approval of the discriminatory resolution. Therefore, it is clear that the deprivation of property rights pursuant to Resolution 74-05 cannot occur without the aid and participation of the United States.

That such discriminatory legislation would never be permissible by a state is equally clear. The United States (U.S. Br., p. 41) has attempted to liken Resolution 74-05 to the state regulation at issue in *Baldwin* v. *Montana Fish and Game*

Commission, 436 U.S. 371 (1978). The form of regulation attempted by Resolution 74-05 is entirely different from that upheld in *Baldwin*. In *Baldwin*, Montana was able to show a rational basis to justify assessing nonresidents a higher licensing fee. Moreover, Montana did not attempt to completely prohibit hunting by nonresidents; nor did it make any distinction based on ethnicity of hunters or landowners.

In contrast, no rational basis for 74-05 has been demonstrated. First, there is nothing in the record establishing a shortage of fish or game on the reservation. Second, there has been no showing that nonresident owners and other non-Indians hunting or fishing on fee lands have in any way interfered with the Crow Tribe's hunting and fishing rights. In *Toomer v. Witsel*, 334 U.S. 385 (1948), this Court stated that discrimination against noncitizens would be constitutional only where it had been established "that non-citizens constitute a peculiar source of the evil at which the statute is aimed." In striking down legislation which placed much higher fees on non-resident than resident fishing, the Court said:

> "We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them." (334 U.S. at 399)

Third, and perhaps most importantly, there is no evidence that the Crows have made any efforts to regulate the hunting and fishing activities of their own members. Faced with a somewhat similar regulatory scheme in *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 285 (1977), this Court noted: "A statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all." See also *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979). Therefore, the lower court's decision upholding the validity of Tribal Resolution 74-05 should be reversed.

CONCLUSION

For the foregoing reasons, the district court's entire judgment should be reinstated.

RESPECTFULLY SUBMITTED this 25th day of November, 1980.

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Statement of Interest of Amici Curiae

The Coeur d'Alene Indian Reservation in Idaho and the Spokane Indian Reservation in Washington have navigable bodies of water within the exterior boundaries of their Reservations. The Tribes claim and assert ownership of the bed and banks of these navigable bodies of water, and realize that any future litigation of their claim to such will be decided against the backdrop of this case[1]. These property interests, until the current appeal, were thought to be sacrosanct and in most instances are the subject of special legislation, contracts or governmental course of conduct of many years recognizing these interests legally, civilly and jurisdictionally. It would be unthinkable that a decision at this time could be promulgated by the United States Supreme Court which could have the effect of calling these titles into question.

The primary focus of this brief is to answer the amicus brief of the State of Washington. The Tribes limit their brief to the sole question of who owns the bed and banks of the navigable Big Horn River that flows through the heart of the Crow Indian Reservation in Montana. It is the understanding of the Tribes that other amicus curiae briefs will be filed on the question of Tribal regulation of non-Indian hunting and fishing.

Introduction and Summary of Argument

Prior to the entry of Montana into the Union in 1889, the United States Government had established a reservation for the Crow Tribe of Indians. The reservation was established by a metes and bounds description

[1] At the present time, the Coeur d'Alene Tribe and the Spokane Tribe are litigating their right to compensation for the use of the bed and banks of the navigable waters within their Reservations under 10(a) of the Federal Power Act. Federal Energy Regulatory Commission Project No. 2545.

including all land, therefore, the beds of all bodies of water, contained within that description. By the Organic Act of the Montana Territory, Congress made it clear that the Crow lands were to constitute no part of the Territory of Montana. The subsequent State of Montana disclaimed any right and title to Indian lands within its boundaries, including the Crow Reservation.

Congress recognized the Tribal ownership of the bed and banks of the navigable waters, for in subsequent cessions to the United States government by the Tribe, the United States carefully included and excluded the beds of the same as it suited the needs of the United States at that time. At no time did the United States ever recognize or adhere to any possibility of state ownership of those beds[2].

The State of Montana refuses to accept the existence of Indian ownership of the bed and banks of the navigable bodies of water within Indian Reservations. The State continues to re-litigate the same issues often settled by the Ninth Circuit. The Ninth Circuit line of cases on the issue of ownership of the bed and banks should control.

Montana attempts to convince the Court that *Choctaw Nation v. Oklahoma*, 397 US 620 (1970), involved fee title, and thus was of a significantly different nature from the Crow lands in question. The state fails to recognize that the restricted nature of the Choctaw and Cherokee "fee" is of no significant difference than the restricted trust status of the Crow lands.

If the legal position of the State of Montana is correct and the State of Montana received title to the beds of all the navigable waters on Indian Reservations at the time of

[2] The above is most extensively covered by the Brief of the Respondent Crow Tribe which is being filed simultaneously with this Amicus Brief.

statehood, then, on that date, a sudden phenomenon happened on each reservation. Each was instantly laced and criss-crossed with enclaves of state ownership. Suddenly the state was the owner of the beds of every navigable body of water within Indian Reservations. This title phenomenon occurred not yesterday but on the day of statehood nearly a century ago. If this in fact occurred and we replayed history, we can only speculate about the different story that would be told today about the lease and utilization by the Montana Power Company of the power site of Kerr Dam on the Flathead and the building by the United States of Yellowtail Dam on the Crow Reservation with its condemnation action and statutory taking of the bed of the river.

Finally, the State of Washington, in its amicus brief, equates ownership of the beds of rivers with navigational servitude, stating that if the Tribes held ownership of the bed, then the Tribes would have had the right to exclude non-Indians. In confusing Indian title with Indian rights, Washington fails to realize that the Tribes recognize navigational servitude in the United States — as must the several states.

Washington also argues that as the riparian beds of the Big Horn River passed into non-Indian ownership, the ownership of the bed passed piecemeal into state ownership. Besides being a practically unmanageable concept, the state fails to note that in *Choctaw Nation*, the Tribes had long since lost title to the riparian lands.

I
State of Montana Stubbornly Refuses to Accept Federal Rule of Tribal Property Interests in the Waters and Beds of Streams

Washington's and Montana's briefs dramatize the refusal of States and their attorneys general (reflecting the political opinion of their states) to accept what is from

the Tribes' point of view settled property law in the fields of Indian water rights (Winter's rights) and ownership of the beds and navigable bodies of water.

This intransigence on the part of Montana has resulted in it becoming and remaining a cradle of sorts of Indian law on these two fundamental fields. Montana was the wellspring of Indian water law in the cases of *Winters v. United States*, 207 US 564 (1907) and *Conrad Inv. Co. v. United States*, 161 Fed. 829 (1908).

One would think that with such a clear Supreme Court ruling and Ninth Circuit decisions affirming the extent and nature of tribal water rights, Montana would reconcile itself to them. It has not.

Washington, like Montana, has its own landmark Winters rights cases which seem to settle the law of reserved water rights in favor of the Tribes. *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (Ninth Circuit 1956), Cert. Denied, 352 US 998 (1956); *United States v. Ahtanum Irr. Dist.*, 330 F.2d 897 (Ninth Circuit 1964), Cert. Denied, 381 US 924 (1965); *United States v. Ahtanum Irr. Dist.*, 338 F.2d 307 (Ninth Circuit 1965). Washington does not accept those decisions despite their apparent finality and is presently locked in litigation with several Tribes re-trying the same issues. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. 1978), Aff. Ninth Circuit, August 20, 1980, Civ. No. 79-4297; *United States v. Anderson*, Civ. No. 3643 (E.D. Washington, July 23, 1979); *United States v. Bel Bay Community and Water Association*, Civ. No. 303-7102 (W.D. Washington, filed 1979).

The Tribes and their federal trustee have, all over the west, had to litigate and re-litigate the question of their reserved water rights.

UNITED STATES v. MONTANA
Follows the Same Repetitious Line

As in the Winters rights to the use of water, the Tribes of Montana thought they had early on secured their property rights to the beds of navigable streams.

On one reservation alone, the Flathead, case law evolved that firmly and hopefully for all times established these Tribal property rights to the beds. *Montana Power v. Rochester,* 127 F.2d 189 (1942); *United States v. Pollmann,* 364 F.Supp. 995 (1973); *The Confederated Salish and Kootenai Tribes v. Namen,* 380 F.Supp. 452 (D. Montana, 1974); *The Confederated Salish and Kootenai Tribes v. Namen,* 534 F.2d 1376 (Ninth Circuit, 1976); *The Confederated Salish and Kootenai Tribes v. Namen,* Civ. No. 79-143 (D. Montana, September 20, 1979).[3]

With all respect to the Federal District Court Judge in *United States v. Finch,* 395 F.Supp. 205 (1975), and the current case, he, like his counterparts in other States, has appeared to seek rationales and means to deny established Tribal property rights on waters and stream beds and to set the stage for this recurring appellate process.

In 1975, Judge Battin ruled that this Court's decision in *United States v. Holt State Bank,* 270 US 49 (1926), was controlling rather than the more recent and similar case of *Choctaw.* He stated:

> "I conclude from the above that the treaties involved in this case most closely approximate those in *Holt State Bank* and not those in the *Choctaw Nation.*"

United States v. Finch, supra, at 210.

He also ruled that the title was not held by the United States in trust for the Tribe.

The Ninth Circuit gave the District Court's opinion on title short shrift. *United States v. Finch,* 548 F.2d 822

[3] These cases are discussed in more detail below.

(Ninth Circuit 1976), vacated on other grounds, 433 US 676 (1977). As to the title question of who owned the bed of the river, that Court found that the treaty history of the Crows was more similar to *Choctaw* than to *Holt* and reversed the District Court. It, in fact, found little similarity to *Holt* and a close similarity to *Choctaw*.

Following an excellent summary and analysis of the sequence of treaties and dealings with the Crows, the Court stated:

> "We rule, in the light of the foregoing, that in establishing the Crow Reservation, the United States intended that all lands therein, including the river bed, were to be for the exclusive use of the Tribe."

Id., at 831.

One cannot read this series of cases and not be disturbed that Montana would again litigate this question in the current series. Except for the later dates and different case titles, a casual reader would think it to be the same case.

Again, for the same reasons given in the first decision of *United States v. Finch*, 395 F.Supp. 205 (D. Montana 1975), and ignoring the intervening Ninth Circuit contrary decision of *United States v. Finch*, 548 F.2d 822 (Ninth Circuit 1976), the same district judge held that the State and not the Tribe owned the bed of the river. *United States v. Montana*, 457 F.Supp. 599 (D. Montana 1978). He again cited and discussed *Holt* and *Choctaw*, still liking *Holt* better and again held:

> "The treaties, the evidence, and the arguments presented in this case involving the Crow Indian Reservation, in particular the title to the bed and banks of the Big Horn River, most closely approximate those in the *Holt State Bank* case, *supra*, and not those of the *Choctaw Nation* case . . . such analysis compels a conclusion that the bed and banks of the Big Horn River passed to the State of Montana upon its admis-

sion to the Union."

Id., at 607.

Citing his own decision in *Finch*, he refused to follow the Ninth Circuit decision that had reversed him. He ignored other cases that seemed to contradict him[4]. He did cite the *Finch* appeal history and noting the reversal by the Supreme Court "on other grounds" stated:

> "This court does not feel bound by the circuit's determinations in the *Finch* case, *supra*. The circuit's decision in *United States v. Finch, supra*, may be an indication of how that court would rule if there were an appeal in this case. However, I am confident that the Court of Appeals will find, on their record made here, that the bases for its earlier decision are not supported by the record."

United States v. Montana, 457 F.Supp. 599, n. 1 (D. Montana 1978).

The Ninth Circuit was unmoved. In *United States v. Montana*, 604 F.2d 1162 (Ninth Circuit 1979), the court, after again summarizing the treaty history of the Crows, stated:

> "We have previously considered the status of the title to the banks of the Big Horn River within the exterior boundaries of the Crow Reservation. (Cites Omitted). We held that to the ordinary high water mark the title to the bed and banks of the Big Horn is held by the United States in trust for the Crow Tribe. Although our judgment was vacated by the Supreme Court on grounds not related to the issue of title, we regard our authority in *Finch* as the appli-

[4] Ie., surprisingly he nowhere cites the contrary Flathead cases which were so important in *Choctaw* and originated in his own court. *Montana Power v. Rochester*, 127 F.2d 189 (1942); *United States v. Pollmann*, 364 F.Supp. 995 (1973); *The Confederated Salish and Kootenai Tribes v. Namen*, 380 F.Supp. 452 (D. Montana 1974); *The Confederated Salish and Kootenai Tribes v. Namen*, 534 F.2d 1376 (Ninth Circuit 1976); *The Confederated Salish and Kootenai Tribes v. Namen*, Civ. No. 75-143-M (D. Montana Sept. 20, 1979).

cable authority in this circuit."

Id., at 1166.

That court in its "post script" (Id., at 1172), seems to agree with the writer on the need for clear and final decisions, finalizing questions of title. The Per Curiam on the State's Petition for Rehearing carried this concept forward. To the United States' argument of the need for a uniform national rule "because of the vast amount of lands held in trust for the Indians that it administers", the court said[5] that in the interest of uniformity of title, the "title to the bed and banks of the Big Horn extends to the ordinary high water mark."

The writer, on behalf of the many Tribes with recognized title to the beds of navigable waters within their Reservations, calls on this court to do what the Ninth Circuit attempted, issue a clear, strong, general and unassailable decision, recognizing Tribal title, in words and form that the States of Montana and Washington will understand so that these states will not continue to litigate and re-litigate these same issues.

II
Earlier Flathead Cases Should Control

As discussed above, the refusal of the Montana District Court to cite and follow the legal precedent set in the family of Flathead Tribal cases beginning with *Montana Power Company v. Rochester*, 127 F.2d 189 (Ninth Circuit 1942), is alarming.

This series of cases, litigated in the same courts as the current series, established the property rights of the Confederated Flathead and Kootenai Tribes to the

[5] The court stated thus on the question of whether the property line was at the high water or low water mark.

southern one-half of Flathead Lake and the Flathead River. *Rochester* is significant also in that the litigating parties were Montana Power Company, the Tribal lessee of the power site, and Rochester, a private landowner.

With factual, historical background no stronger than that of the Crows, the Ninth Circuit, in reversing the local federal district court, had no trouble in holding:

> "Whether the ownership was originally in the Indians or in the United States, it is certain that by the treaty the United States undertook to hold title to the reserved area, including the bed of the southerly half of the lake, in trust for the Confederated Tribes."

Id., at 191.

The only real question was whether that title was to the low water mark rather than to the high water mark. The Ninth Circuit dealt with both that question and the question of title in a pointed paragraph as follows:

> "In the circumstances here we do not believe the question whether the Indian patentees took to low water, or only to high, is one of state law. Clearly, the United States in the exercise of its sovereign power had the right to deal with the lands below high water mark as they saw fit. *Shively v. Bowlby, supra, Alaska Pacific Fisheries Co. v. United States,* 248 US 78; *Donnelly v. United States,* 228 US 243; *Taylor v. United States,* Ninth Circ., 44 F.2d 531, 533; and the treaty leaves no room for doubt that the government chose to hold the entire area, submerged lands no less than uplands, in trust for the Indians rather than for the future state to be carved out of the region."

Id.

Thus the Ninth Circuit thought it had settled this title question forever.

Despite *Rochester,* the title and rights of the Flathead Tribes to the bed and banks of the Flathead Lake within

the Reservation have been the subject of a subsequent series of cases. While the decisions in several of these have wandered to and fro on issues of jurisdiction, rights of dockage, etc., all have recognized the Tribal title to the bed.

In *United States v. Pollman*, 364 F.Supp. 995 (D. Montana 1973), the question was whether the Tribes had exclusive control over fishing on the waters. Judge Jameson, citing *Shively*, held that while it was true that the United States generally held title to submerged lands under navigable waters in trust for the future states, in the case of Indian reservations like the Flatheads, under the law cited in *Choctaw* and *Rochester*, which he found controlling, title to the beds was held for and passed to the Tribes.

Identical issues reared their heads in *Confederated Salish and Kootenai Tribes v. Namen*, 380 F.Supp. 452 (D. Montana 1974), with similar parties and lawyers and the same judge. While holding in favor of riparian owners on rights of wharfage and public navigation, the court, citing *Shively*, again stated that title to the bed and banks of the southern half of the Flathead Lake below high water mark is held by the United States in trust for the Tribes.

On appeal, the Ninth Circuit affirmed on all points. *The Confederated Salish and Kootenai Tribes v. Namen*, 534 F.2d 1376 (Ninth Circuit 1976). On return of the case for additional proceedings to establish the reasonable needs and rights of Namen and the City of Polson for wharfage, one would think that the litigants would have recognized the Tribal title to the bed. They continued to question it and on retrial of the consolidated cases of *Confederated Salish and Kootenai Tribes v. Namen* and *City of Polson v. Confederated Salish and Kootenai Tribes*, Civ. No. 2343 and 75-143, September 20, 1979 (restated again in opinion of April 8, 1980), the Federal District Court for Montana again held that the United

States held title to the bed and banks of the southern half of the lake in trust for the Tribe, citing its previous holdings in *Rochester* and *United States v. Montana* as controlling.

Judge Jameson then proceeded with a scholarly discussion and analysis of *Shively, Rochester, Holt* and *Choctaw Nation* and, on the question of title, concluded:

> "While the treaty provisions construed in *Choctaw* differ somewhat from the treaty involved in this case, I find nothing in *Choctaw* which would justify a departure from the holding in *Rochester, Namen* I, and other cases which followed *Rochester. Rochester* is the law of the circuit and is controlling. . . . The United States holds title to the bed and banks below that point [the high water mark] in trust for the Tribes."

Id.

The building, in the early 1930's, of Kerr Dam by the Montana Power Company under lease from the Tribes just below the outlet of Flathead Lake and its operation to the present day utilizing the storage capacity of the lake as its reservoir has been a prime economic asset of the Tribes and a rich repository of law to the present day. Reams could be written summarizing the various FPC, Department of Interior, Congressional, Court of Claims, and appeal courts considerations, reviews and lawsuits regarding the lease of the Kerr Dam site from The Confederated Salish and Kootenai Tribes (Flatheads) on the Flathead Reservation in western Montana. The resulting cases before the courts of the United States were as follows: *Confederated Salish and Kootenai Tribes v. United States,* 181 Ct. Cl. 739 (1967); *Confederated Salish and Kootenai Tribes v. United States,* 417 F.2d 1340 (Ct. 1969); *Confederated Salish and Kootenai Tribes v. United States,* 467 F.2d 1315 (Ct. Cl. 1972); *Confederated Salish and Kootenai Tribes v. Vulles,* 437 F.2d 177

(Ninth Circuit 1971); *Montana Power v. FPC*, 445 F2.d 739 (DC Circuit, 1970) Cert. Denied 400 US 1013; *Montana Power v. FPC*, 459 F.2d 863 (DC Circuit, 1972).

All these cases assumed and did not question the title of the Tribes to the bed of the Flathead River at the power site and to the river and one-half of the lake that constitutes the reservoir. The legal questions involve the extent and rights of the Tribe to reasonable compensation from its private lessee.

It is inconceivable that, after decades of governmental and contractual recognition of the Tribes' title, the court would in this current case, do anything that could jeopardize that Tribal title and right.

A similar story could be told of several other power sites on reservation lands where the title and right of the Tribes involved are little, if any, different than that of the Crows in this case.

III

"Fee" Ownership of Choctaw and Cherokee Reservations, as provided for by Treaty, is not a Sufficient Basis to Distinguish CHOCTAW v. OKLAHOMA From the Facts of this Case

The petitioners attempt to distinguish the holding of *Choctaw Nation v. Oklahoma, supra*, from the facts of this case by asserting that since the Reservations in that case were given by fee title, a crucial distinction can be made from the Crow lands in this case. (See Pet. Brief, Page 21 et seq.) Petitioners seemingly do not comprehend the restricted fee status that the Choctaw and Cherokee Tribes received.

In speaking of the restricted status of the land of the five civilized tribes, this Court stated:

> "Restricted Indian land is property in which the United States has an interest. *'This national interest*

is not to be expressed in terms of property, or to be limited to the assertion of rights incidental to the ownership of a reversion or the holding of a technical title in trust.'"

United States v. Hellard, 322 US 363, 366 (1944).

This court went on to state that the United States was a necessary party and had an interest in the partition of lands of the five civilized tribes "as it would . . . if the fee were in the United States." Id.

This court also recognized that fee title status of Indian lands is the practical equivalent of lands held in trust for the Tribes. Speaking of the Pueblo title (held in fee simple) to lands subject to restraints on alienation, the court said that such restraints were "essential to the protection of such Indians." *United States v. Candelaria*, 271 US 432 (1926).

It is obvious that the United States government possessed an interest in the Choctaw and Cherokee lands at issue in the *Choctaw Nation* case. The restricted status of those lands is absolutely clear from legislation affecting those lands.

The Treaty of Dancing Rabbit (Act of September 27, 1830, 7 Stat. 333) which established the fee status of the Choctaw lands made it clear that those same lands would revert to the United States if the Tribe ceased to exist as an entity.

The Restraints on the Sale, Lease, etc. of the Choctaw and Cherokee Lands are Almost Identical to Those on Trust Lands

The restricted lands of the Five Civilized Tribes were and continue to be subject to an elaborate framework of statutes regarding restraints on their sale, lease, etc. A long series of intercourse acts,[6] presently embodied in 25

[6] E.G. Act of July 22, 1790, 1 Stat. 137; Act of March 1, 1793, 1 Stat. 329; Act of May 27, 1908, 35 Stat. 312.

USC Section 177, state that Indian lands cannot be purchased without the approval of the United States government. These acts have been deemed applicable to Tribes holding their fee by patent. 9 Op.AG 24, 27 (1857).

The allotment acts of the Choctaw Nation[7] and the Cherokee Nation[8] state that the lands so alloted were to be non-transferrable. Conveyances of restricted lands must have the consent and approval of the Secretary of Interior[9]. The allotted land cannot be encumbered by any deed, debt or obligation[10]. Funds from the sale of restricted lands become in turn restricted, subject to the supervision and control of the Secretary of Interior[11]. Royalties from restricted lands are in turn restricted funds[12]. The leasing of the restricted lands of the Five Civilized Tribes is also subject to the approval of the Secretary of Interior[13]. Although the restricted lands of full

[7] Act of June 28, 1898, 30 Stat. 495, 505-13.

[8] Act of July 1, 1902, 32 Stat. 716.

[9] Act of July 2, 1945, 59 Stat. 313.

[10] Act of August 1, 1914, 38 Stat. 601, 25 USC Section 86.

[11] Act of March 3, 1911, 36 Stat. 1070, 25 USC Section 156.

[12] 25 USC 356; *House v. United States*, 144 F.2d 555 (Tenth Circuit 1934), Cert. Denied 323 US 781.

[13] Act of April 26, 1906, 34 Stat. 137, 144; Act of May 27, 1908, 35 Stat. 312, 313, Act of February 14, 1920, 41 Stat. 408, 25 USC 356; Act of February 11, 1936, 49 Stat. 1135, 25 USC 393(a); Act of August 4, 1947, 61 Stat. 731; 25 CFR 174; *House v. United States, supra; United States v. Haddock*, 21 F.2d 165 (Eighth Circuit 1927).

bloods are subject to partition according to the laws of Oklahoma, the same retain their restrictions on alienation[14]. Congress also remains in control of the determination of heirship to the lands of deceased allottees of the restricted lands[15]. Finally, the United States government has the sole authority to remove any restrictions on the land of the Five Civilized Tribes[16].

The Restricted Lands of the Cherokees and Choctaws Are Not Taxable

Just as the reservations of Tribes holding their land in trust are not taxable, so are the lands of the Choctaw and Cherokee Nations. The non-taxability of their lands is clear from statute[17] and from case law[18].

Summary

The petitioners would have us believe that the fee title which was given by treaty with the Choctaw and Cherokee Nations was a classical fee simple absolute, unencumbered by any restraints. As we have seen, restraints and restrictions on the "fee" of the Choctaw and Cherokee lands were many and they were significant. It might be said that when the totality of the restraints are weighed, no real difference between the restraints that exist on trust lands and the restraints on Choctaw and Cherokee lands exists.

[14] Act of June 14, 1918, 40 Stat. 606, 25 USC 355.

[15] Act of June 14, 1918, 40 Stat. 606, 25 USC 375, 375 (a)-(d).

[16] 25 CFR 121.12 et. seq.

[17] Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 716; Act of April 26, 1906, 34 Stat. 137; Act of May 27, 1908, 35 Stat. 312.

[18] *Choate v. Trapp*, 224 US 665 (1912); *United States v. Board of Commissioners of McIntosh County, Oklahoma*, 154 F.2d 600 (Tenth Circuit, 1946).

IV

Amicus Brief of the State of Washington

Because the amicus Tribe, the Spokane Tribe of Indians, has its reservation within the boundaries of the State of Washington, the Tribe wishes to comment on the arguments of the Washington State Attorney General in the Amicus Brief of Washington.

Washington begins its discussion with a misunderstanding of the degree of title received by the State to the beds of the navigable waters. It compounds this misunderstanding by expressing a similar misunderstanding of the degree, nature and extent of title to the same river beds when held for the Tribes.

When a state receives title to the bed of navigable waters under the equal footing doctrine, it is settled law that the title it receives is subject to the navigational servitude reserved in the United States for the benefit of the entire nation. *United States v. Virginia E. & P. Co.*, 365 US 624 (1961); *United States v. Willow River Power Company*, 324 US 499 (1945); *United States v. Commodore Park*, 324 US 386 (1945).

Similarly, when a Tribe reserves or is granted a reservation which includes that of a navigable body of water, that title is subject also to the same navigational servitude. *United States v. Grand River Dam Authority*, 363 US 229 (1960). Washington ignores this converse concept.

Washington Brief Confuses Indian Title With Indian Rights

The Washington brief is classic in its confusion of Indian rights with Indian title. Washington argues that, because the Crow treaty reserved to the Tribe the right of "absolute and undisturbed use and occupation" of the reservation lands with the power to exclude from them non-members, the Tribe, if it owned the bed of the river,

would have had the right to absolutely exclude the public from use of the river for navigation. This is not correct as aforesaid. The Tribe holds its title to the river bed subject to the same servitude that Montana does to navigable river beds outside the Reservation. The public has the same rights to the use of the river for navigation whether owned by the Tribe or the State.

As is evident from the cases cited by all parties, there are innumerable examples of the bifurcation of Indian title and Indian rights. Pages could be filled with citations of cases and law holding that Indians have hunting and fishing rights at usual and accustomed places that have nothing to do with title. *United States v. Washington,* 384 F.Supp. 312 (W.D. Washington 1974), Aff. 520 F.2d 676 (Ninth Circuit 1975); *Puyallup Tribe v. Washington Department of Game,* 433 US 165 (1977); *Washington Department of Game v. Puyallup Tribe,* 414 US 44 (1973); *Puyallup Tribe v. Department of Game of Washington,* 391 US 392 (1968). Tribes have prior and paramount (Winter's) rights to water for irrigation and other beneficial uses that are in no way dependent on the Tribes having an ownership interest in the source of the water. We have a whole body of law regarding the retained rights of Tribes and their members to hunt, fish, gather roots, etc., on lands off the Reservation. *Seufert Brothers Co. v. United States,* 249 US 194 (1919); *United States v. Winans,* 198 US 371 (1905); *Tulee v. Washington,* 315 US 681 (1942). In this body of law it was established that the off Reservation non-Indian lands are often held subject to these Indian rights. The Tribes have no title at all.

Conversely an equal number of cases and law can be listed in which Tribal and individual Indian title is subject to many qualifications and restrictions. The modern reservation is laced with highways, roads, railroads, transmission lines, pipelines, and other arteries and

sinews of commerce so that the average citizen is not even aware that he is passing, in his individual travel and commerce, through an Indian reservation.

The Indian lands themselves are checkerboarded with non-Indian lands and fractionated into shared titles in which Tribes, individual Indians and non-Indians share interests in various tracts. In modern law the jurisdictional and title patterns of Indian Reservations and lands have experienced the same legal evolution to accommodate public and private rights, especially of passage and commerce, as have other public and private lands.

It is interesting that Washington does not cite one of its own landmark cases, that of *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969). This case had to do with the bed of Chelan Lake, a navigable body of water, on which, because of a power dam, the water was annually raised approximately 20 vertical feet above the normal high water mark so that the private abutting land was seasonally overflowed and exposed by the seasonal fill ups and draw downs. The question was whether the public rights to navigation and use of the surface of the water ebbed and flowed with the water, expanding over the private lands at high water, so that the owner of the underlying private land could or could not fill and use it in such a way to prevent this public use. The court held with the public saying:

> ". . . we hold that when the level of Lake Chelan is raised to the 1,100 foot mark (or such level as submerges the defendant's land), that land is subject to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. . . . When the level of the lake is lowered so that the defendant's land is no

longer submerged, then they are entitled to keep trespassers off their land, and may do with the land as they wish consistent with the right of navigation when it is submerged . . ."

Id., at 316.

Thus we have an outstanding example of the non-coincidence of title and right.

An excellent example of this bifurcation of title and right and the intrusion of public rights to navigation onto an Indian reservation is the legal pattern and use of Roosevelt Lake behind Grand Coulee Dam. On the Colville and Spokane Reservation sides of the resulting lake, the federal government took to elevation 1310 above sea level the top 20 feet of which is freeboard land. The question of the retained title and rights of the Tribes to the lake surface and beds has been treated in two opinions by the Solicitor. 59 I.D. 147 (1945); 84 I.D. 72 (1974). Both opinions hold that whereas the Tribes still own or hold title to the submerged beds and banks of the Columbia and Spokane Rivers, that title was and is subject to the navigational servitude of the United States. The 1974 opinion holds that the Tribe has exclusive hunting and fishing rights to the freeboard areas and approximately one-half of the lake surface bordering their Reservations.

The United States in this project recognizes the Tribal title to the bed and banks of the submerged rivers (a situation not unlike that of the bed and banks of the Big Horn within the Crow Reservation) but acknowledges very few rights of the Tribes growing out of that title. Act of June 29, 1940, 54 Stat. 703, 16 USC Sec. 835d. On the other hand, without title to the freeboard and water surface bordering their Reservations, it recognizes exclusive Tribal rights for hunting and fishing.

It was in *Choctaw Nation v. Oklahoma*, 397 US 620 (1970), that whereas the state presumed to be able to

be able to lease the bed of the Arkansas River for oil drilling, subject to the navigational servitude, the Supreme Court held that title was not in the state, but was in the Tribes, also subject to navigational servitude. The Ninth Circuit in *United States v. Finch*, recognized and reasserted the navigational servitude of the Big Horn River.

> "We thus conclude that the United States, by citing the Treaty of 1868 with the Crows, intended to grant them dominion and control over that portion of the bed of the Big Horn River situated within the Reservation, (Cites Omitted), *subject to the retained power of the United States to exercise its paramount right to control navigation on the river.*" (Emphasis Ours)

United States v. Finch, 548 F.2d 822, 831 (Ninth Circuit 1976).

Tribal Ownership of the Bed of the River is Consistent With Non-Ownership of Adjacent Lands

Again Washington, in an excess of legal reasoning, states on page 13 of its Brief that even if the Tribe had the beneficial title to the bed at the time of statehood, that title passed into state ownership as adjacent landowners alienated to non-Indians.

The *Choctaw* case, *supra*, teaches just the opposite, with the Tribes retaining title to the riverbed even though they have long since lost title to the riparian lands.

Conclusion

We hope that the Supreme Court will hold firm against this last assault by the states against the long established and legally recognized ownership rights of the Tribes to the beds of navigable waters. This Court should not break the precedent of the many cases cited above. An opposite decision would result in a nightmare of litigation and re-litigation as Tribal ownership rights to navigable

beds would be challenged on every Reservation that has them.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,
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IN THE

Supreme Court of the United States

October Term, 1979

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Petitioners,
v.
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE

Confederated Tribes of the Colville Indian Reservation, Quinault Indian Nation, Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana, Shoshone Tribe of the Wind River Reservation, Wyoming, Nez Perce Tribe of Idaho, and The Association On American Indian Affairs, Inc.

IN SUPPORT OF RESPONDENTS

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IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

This brief is submitted with the written consent of all parties to the case, lodged with the Clerk. *Amici*, six federally recognized Indian Tribes, enjoy various hunting and fishing rights within their reservations which may be affected by the outcome of this case. In addition, each of the tribes has navigable bodies of water within or forming the boundary of their reservations, and claims ownership of the submerged lands.

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the

laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States and is nation-wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians.

The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District Court*, 420 U.S. 425 (1975) and the filing of *amicus curiae* briefs in *Washington v. Washington State Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979);*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Mescalero Apache Tribe v. Jones*, 411 U.S. 128 (1972); *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968) and *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

SUMMARY OF ARGUMENT

1. It is undisputed that the Crow Tribe has treaty fishing and hunting rights on its reservation. The State of Montana, despite a tribal prohibition of non-member hunting and fishing on the reservation, continues to authorize non-Indian sport hunting and fishing on reservation fee lands. This Court has at least a dozen times this century acted to protect tribal fishing and hunting rights against incursions by states and private persons. Not only have direct interferences by states against Indians themselves been prohibited, *see e.g., Antoine v. Washington*, 420 U.S. 194 (1974); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), but the states have also been prohibited from authorizing *non-Indians* to take action inconsistent with those rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1970). *See also United States v. Winans*, 198 U.S. 371

(1905); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918). These holdings control here; unless the tribal prohibition remains effective, the state will continue to permit non-Indians to hunt and fish which will tend materially to reduce the natural supply of fish and game available to the Indians.

In addition, this Court has repeatedly recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians in which the tribes have a significant interest on reservation lands. *Washington v. Confederated Tribes of the Colville Indian Reservation,* .... U.S. ...., 65 L. Ed. 2d 10 (June 10, 1980). This tribal sovereignty retains a significant geographical component and extends to the reservation boundary. *White Mountain Apache Tribe v. Bracker,* 48 U.S.L.W. 4897, 4901 (June 27, 1980). The Crow Tribe has clearly demonstrated a significant interest in the hunting and fishing activities of non-Indians on the reservation sufficient to justify this exercise of tribal civil jurisdiction.

2. The Crow Indian Tribe retains beneficial ownership of the bed and banks of the Bighorn River. Based on a series of this Court's decisions including *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *Donnelly v. United States,* 228 U.S. 243 (1913); and *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970), as well as a host of lower court decisions, *e.g., Moore v. United States,* 157 F.2d 760 (9th Cir. 1946); *Montana Power Co. v. Rochester,* 127 F.2d 189 (9th Cir. 1942); *United States v. Alaska,* 423 F.2d 764 (9th Cir.) *cert. denied* 400 U.S. 967 (1970), the Crow Tribe has settled expectations that it retains beneficial ownership of the bed and banks of the Bighorn River. This is so not only because of the utility of the bed and waters of the river in satisfying the purpose of the reservation, to establish a self-sustaining homeland for the Indians, *see Alaska Pacific Fisheries, supra,* but also because of the "natural inference" of ownership which

arises because the disputed riverbed lies entirely within the exterior boundaries of the Reservation. *See Choctaw Nation v. Oklahoma, supra.* These legitimate expectations should not be frustrated.

ARGUMENT

I. The Crow Tribe Has Authority to Prohibit Non-Resident Non-Members from Hunting and Fishing on the Crow Reservation.

The primary issue presented in this appeal is whether a tribe, in order to protect the treaty hunting and fishing rights of its members on the reservation, may prohibit non-members from hunting and fishing on reservation fee lands upon which they do not reside. *Amici* suggest that the issue can be resolved by reference to this Court's prior decisions protecting Indian treaty hunting and fishing against incursions by states and by private parties. Alternatively, the tribal prohibition is sustained by this Court's decisions protecting tribal governmental power over subject matters substantially affecting tribal interests on reservations.

The Crow Reservation is a substantial Indian Reservation in Montana with several thousand Indian residents. Indians are a majority of the population on the Reservation, and over two-thirds of the land is owned by the United States in trust for Indians.[1] The Tribe's 1973 Resolution closing the Reservation to hunting and fishing by non-members was enacted because the Tribe determined that there was an on-reservation shortage of the fish and game upon which members depended for subsistence. See Petition App. 119; Crow Tribe Brief on Petition at 2-3. This case was brought to sustain the validity of the

1. The court below found that the Reservation contains 2,282,764 acres. The court found that there are almost 1,200,000 acres of trust allotments (52.02 percent of the Reservation) and over 390,000 acres of tribal trust lands (17.33 percent of the Reservation). Privately owned fee lands are 28.33 percent of the Reservation's acreage. *United States v. Montana,* 604 F.2d 1162, 1164, n.3, (9th Cir. 1979).

prohibition against the claim by the State of Montana of continuing power to license non-Indians to hunt and fish for sport on the Reservation.

The court of appeals sustained the tribal prohibition as applied to non-residents of the Reservation, and as applied to residents "except . . . hunting and fishing . . . on fee patent lands on which such non-members reside." 604 F.2d at 1165. The State appeals both this portion of the decision and the court of appeals' holding that the bed of the Big Horn River, which flows through the Reservation, is held by the United States in trust for the Tribe and not owned by the State.[2]

The Tribe and the United States have not petitioned for review of the lower court's preclusion of tribal prohibition of hunting and fishing by residents on their own lands, so that issue is not before the Court. The State and its supporting parties now concede tribal authority to prohibit all non-Indian hunting and fishing *on trust lands*[3]—over two-thirds of the Reservation. *See State of Washington v. Confederated Tribes of the Colville Reservation,* .... U.S. ...., 65 L.Ed. 2d 10 (1980). The present dispute, therefore, focuses on whether the State can authorize non-members to hunt and fish on Reservation fee lands upon which they do not reside in the face of a tribal prohibition.[4]

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2. The controversy over ownership of the riverbed is a part of the larger dispute concerning non-Indian hunting and fishing on the Reservation. *United States v. Finch,* 548 F.2d 822 (9th Cir. 1976), *rev'd on other grounds,* 433 U.S. 676 (1977) was a prosecution of a non-Indian fishing in the River as permitted by the State but contrary to the tribal prohibition. The Court held that the bed of the River constituted tribal trust lands, and that the defendant, Finch, could thus be convicted for violating 18 U.S.C. § 1165, a statute prohibiting fishing on such lands without tribal permission. *See* 13, *infra.* This Court reversed on grounds not related to this determination. Meanwhile, the United States and the Crow Tribe had commenced this action for a judgment declaring the validity of the tribal prohibition with respect to all lands within the Reservation, and to adjudicate ownership of the riverbed.

3. State Brief at 30.

4. The court below also determined that the Tribe could regulate hunting and fishing by non-member residents on their own lands in a

A. *The Indian Treaty-Secured Hunting and Fishing Right Cannot Be Subordinated To or Diminished By the State's Licensing of Its Citizens to Hunt and Fish On the Reservation.*

First, it is undisputed and indisputable that the treaties with the Crows reserved to them rights to hunt and fish on the Reservation, and that the Tribe holds these rights today.[5] Article 2 of the Treaty of 1868, 15 Stat. 649, 2 Kapp. 1008, provides in part that the Reservation would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named . . ." Even in the absence of "exclusive use" guarantees, this Court has recognized that the setting aside of a reservation, in itself, guarantees to the tribes the right to hunt and fish. In *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 405-406 (1968), construing a treaty where "nothing was said . . . about hunting and fishing and fishing rights," the Court held that these rights were so central to the Indian way of life that they were necessarily included within a treaty provision setting aside a reservation "for a home, to be held as Indian lands are held." *See also Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918).[6]

During this century the Court has at least a dozen times in different contexts acted to protect tribal fishing and hunting rights (ranging geographically from Wisconsin to Alaska) against incursions by states and private persons.

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reasonable, non-discriminatory fashion consistent with sound principles of conservation. 604 F.2d at 1162, 1172. But no actual tribal regulation of non-members on these lands, as distinct from an outright prohibition, is presented by the facts of this case, and any controversy in this respect is abstract and in *Amici's* view not appropriate for review by this Court.

5. The State so concedes. State Brief at 20.

6. As the Court made clear in *Menominee,* these on-reservation fishing rights survive even termination; it necessarily follows that on a Reservation such as Crow where no termination has occurred, these rights continue. The lesser step, the opening up of parts of the Reservation to non-Indian settlement pursuant to the Allotment Act, has had no effect on these rights. *See e.g., Mattz v. Arnett,* 412 U.S. 481 (1973); p. 7, *infra.*

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979); *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1977); *Antoine v. Washington*, 420 U.S. 194 (1975); *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Menominee Tribe v. Department of Game, supra; Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962); *Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *United States v. Winans*, 198 U.S. 371 (1905). In *United States v. Winans, supra*, the Court described off-reservation treaty fishing rights as "not much less necessary for the existence of the Indians than the atmosphere they breathed", (198 U.S. at 381), and limited the taking of fish by a private person downstream from the Indians. In *Alaska Pacific Fisheries*, the Court affirmed a lower court injunction against a private company's erection of a fish trap in waters on a reservation which "will tend materially to reduce the natural supply of fish accessible to the Indians." 248 U.S. at 87.

In *Menominee*, the Court held that a state could not diminish Indian hunting and fishing rights protected by treaty on a reservation by direct regulation of that right, even where federal trust status of all lands on the reservation had been terminated. The majority of later cases, like *Menominee*, impose limitations on *state action* which directly or indirectly infringes upon the exercise of treaty protected hunting and fishing rights. The most recent decision of this Court, *Fishing Vessel Association*, required the State to limit the non-Indian take of fish outside reservations so that treaty-protected Indian fishing rights would not be infringed.

The principles of these cases control here. This dispute arose because of private activity, authorized by the State, which, unless controlled, will as in *Alaska Pacific Fisheries*

"tend materially to reduce the natural supply of [fish and game] accessible to the Indians" on an Indian reservation.

Even outside a reservation where the state authority is ordinarily undiminished, *Fishing Vessel Association* and other cases teach that states may not authorize non-Indians to infringe on treaty rights to take fish and game. States are prohibited therefore not merely from interfering directly with the exercise of Indian treaty rights by the Indians themselves, but also from authorizing non-Indians to take action which will interfere with those rights.

In the instant case, where the issues arise inside the reservation, the arguments in favor of protecting the tribal rights are even stronger. In fact, in *Fishing Vessel Association,* the Court confirmed that a tribe has power to make its on reservation fishery exclusive. The Court observed:

> *Puyallup III* also made it clear that the Indians could not rely on their treaty right to exclude others from access to certain fishing sites to deprive other citizens of the state of a fair apportionment of the runs. For although *it is clear that the Tribe may exclude non-Indians from access to fishing within the reservation,* we unequivocally rejected the Tribe's claim to an untrammelled right to take as many of the steelhead running through its reservation as they chose.

443 U.S. at 683-84. (emphasis added) Thus, although the tribe may not be authorized to "pursue the last living steelhead," *see Puyallup II, supra,* the Court clearly confirmed its power to make the treaty fishing right on the reservation exclusive of non-Indians.

Moreover, the Court confirmed this tribal power in spite of the fact that the Stevens Treaties construed in *Fishing Vessel Association* provided an equal opportunity to take fish to "citizens of the Territory." There is no such co-equal right involved here. The Indian treaty right is prior and paramount and any privilege allowed non-members to hunt or fish on the reservation is subject to the overriding right of the Tribe to satisfy its treaty rights, even reserving the

fish and game exclusively for its members if it chooses. Simply put, the State here cannot affirmatively permit non-members to hunt and fish when the consequence of that action will be to diminish the fish and game resource necessary to satisfy the treaty hunting and fishing rights of tribal members.

The only souces of authority for non-Indian hunting and fishing upon which the State and its supporting *amici* rely are statutes opening certain unallotted lands on the Reservation to settlement and purchase by non-members. State Br. at 31-32, Act of April 11, 1882, 22 Stat. 42; General Allotment Act of February 8, 1887, 24 Stat. 338 now codified as 25 U.S.C. § 331 *et seq.*; Act of June 4, 1920, 41 Stat. 751. But these acts—at most[7] permit *purchasers of those lands* the privilege to hunt and fish if allowed by state law on their own lands. They surely do not authorize affirmative state action permitting *non-residents* to enter the Reservation to fish and hunt particularly in conditions of scarcity. Nor do these statutes authorize residents to hunt or fish indiscriminately throughout the continuing Reservation on lands they do not own in a manner destructive of tribal rights.[8]

B. *The Tribe Has Governmental Authority to Prohibit Non-Member Hunting and Fishing Which Infringes Upon the Hunting and Fishing Resource Reserved by the Treaty for Tribal Members.*

In the previous section, we argued that the Tribe's proprietary hunting and fishing rights are paramount to any state-created privilege, and should in these circumstances be protected against infringement by the State and pri-

7. *Amici* support the argument of the Crow Tribe that it retains exclusive hunting and fishing rights on the Reservation after these statutes, which do not expressly diminish those rights.

8. *Amici* only suggests that in the present circumstances the tribal prohibition to be effective must completely supplant any state authority to allow hunting and fishing by non-members. We believe that the proper

vate persons licensed by it. But, even without reference to Indian hunting and fishing rights, this Court has consistently protected the right of Indian tribes to govern subject matters on their reservations substantially affecting tribal interests where non-members are involved.

Last term, this Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*, ... U.S. ...., 65 L. Ed. 2d 10 (June 10, 1980), (hereinafter "*Colville*") specifically rejected the arguments advanced here by Montana and its supporting *amicus curiae*, including the State of Washington, that *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1979), precluded tribal exercise of civil jurisdiction over non-members. Although the tax issues presented in *Colville* arose on trust land, there is no reason why an exercise of civil jurisdiction over actions by non-residents on fee land that severely impacts Indian use and occupancy of their retained lands would be any more "inconsistent with the overriding interests of the national government" than the exercise of governmental power in *Colville*. As this Court observed:

> The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power. Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.

65 L.Ed 2d at 28.

Similarly, in *White Mountain Apache Tribe v. Bracker*, 48 U.S.L.W. 4897, 4899 (June 27, 1980), the Court sug-

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scope and extent of state authority in other situations should be considered in cases precisely presenting that issue and not here. This is clearly not a situation, for example, where the Tribe has not undertaken to regulate on-Reservation activities of non-Indians and the State determines that it must regulate such activities in order to preserve the resource.

gested that tribal civil jurisdiction over non-members was not restricted to trust lands:

> At the same time we have recognized that the Indian Tribes retained attributes of sovereignty over both their members and their territory.

Later in the same opinion, the Court observed:

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weight in determining whether state authority has exceeded the permissible limits. 'The cases of this Court have consistently guarded the authority of Indian governments over their reservations.'

Id. at 4901. In support, the Court cited *United States v. Mazurie,* 419 U.S. 544, 557 (1975), and *Williams v. Lee,* 358 U.S. 217, 223 (1959). As the Court took pains to emphasize, it is the reservation boundary, not the fee or trust status of the individual parcel of land, that is significant.

An important early case, cited with approval in *Colville,* 65 L.Ed. 2d at 29, is the court of appeals decision in *Buster v. Wright,* 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906), holding that a tribe by ordinance may lawfully require non-Indians to pay a permit tax, or license fee, as a condition precedent to residing, or doing business, on the reservation. The court stated:

> The authority of the Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origins in any Act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty . . . The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by Act of Congress or by the contracts of the Creek Tribe itself.

135 F. at 950.

The Supreme Court dismissed the appeal in *Buster* on the merits, and costs were taxed to the appellants. Significantly for present purposes, the non-Indians required to pay permit taxes and license fees in *Buster* resided on fee lands within the Reservation.[9]

Buster, Mazurie, Colville, Bracker and other prior decisions of this Court teach that Indian tribes may control non-Indian activities on fee lands that substantially impact the tribe or tribal members. To be sure, Indian ownership of trust lands means *ipso facto* that a tribe will likely have a significant interest in non-Indian activities on those lands. But the critical issue in each case is whether the non-Indian activity sought to be regulated significantly impacts the tribe or its members, and not the technical ownership of land alone. *See also McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 179 (1973) and *Williams v. Lee,* 358 U.S. 217, 221 (1959), confirming that the tribes have civil jurisdiction over non-members and that state law would be preempted if its application "infringed on the right of reservation Indians to make

9. The Department of the Interior has long administratively interpreted *Buster* as empowering an Indian tribe to regulate non-Indian activities on fee lands within a reservation. In *Powers of Indian Tribes,* 55 ID 14, 50 (1934), the Solicitor of the Interior Department concluded:

> Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all the lands of the reservation, *whether owned by the tribe, by members thereof, or by outsiders,* the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority.

(Emphasis supplied) *Id.* at 50. *Amici* do not suggest that a tribe can exclude a non-Indian landowner from his own land on a reservation, for he occupies that land "under lawful authority."

This has continued to be the policy of the Interior Department. In an unpublished opinion dated October 13, 1976, the Solicitor approved an ordinance of the Crow Tribe taxing non-Indian mineral lessees on the Reservation. (A copy of this unpublished opinion is lodged with the Clerk of this Court.) The 1934 Solicitor's opinion was also quoted by the Court in *Colville,* 65 L.Ed. 2d at 28-29.

their own laws and be ruled by them." *Accord, Colville,* 65 L. Ed. 2d at 31.

Non-Indian hunting and fishing on fee lands authorized by the state clearly infringes on both the tribal hunting and fishing right itself and on tribal control of hunting and fishing on the Reservation to protect the interests of its members. The Crow Tribe has a clear and substantial interest in the subject matter, which cannot be protected if tribal jurisdiction is limited to trust lands. Hunting and fishing is vital to the tribal way of life. Fish and game, by their very nature, migrate back and forth inside the reservation and in the face of the State's continued authorization of non-Indian hunting and fishing, tribal subsistence rights can only be protected if the tribal prohibition is effective on fee as well as trust parcels.

This Court's response to the arguments raised by Montana in *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463 (1976), that state jurisdiction turned on the fee or trust status of the land, is particularly apt here. In *Moe,* the Court noted that if Montana's contentions were accepted, "then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size." 425 U.S. at 478. The Court observed that it had rejected a similar argument in *Seymour v. Superintendent,* 368 U.S. 351 (1962), and that it was unreasonable to require law enforcement officers operating in the area to search tract books in order to determine whether they had jurisdiction over an activity occurring on a particular parcel of land. Moreover, the Court emphasized in *Moe* that "such an impractical pattern of checkerboard jurisdiction was contrary to the intent embodied in existing federal statutory law," *id.* at 478, which has demonstrated "a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation."[10]

10. Against these considerations, the State's argument that 18 U.S. § 1165, somehow retracts tribal jurisdiction on fee lands is unpersuasive. That statute makes unauthorized hunting and fishing on trust lands a

C. *This Court Should Not Endorse the Ninth Circuit's Dictum That It Would Be An Impermissible Criminal Sanction for a Tribe to Enforce Its Hunting and Fishing Regulation by Forfeiting the Arms or Other Property of a Non-Indian.*

In approving tribal civil regulatory powers over non-Indian hunting and fishing, the court of appeals observed that tribal enforcement, to be consistent with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), must be accomplished without subjecting non-Indians to the criminal jurisdiction of tribal courts. Although the issue was not presented, the Court also stated:

> Forfeiture of the arms or other property of non-Indians under *Quechan* constitutes an impermissible criminal sanction.

604 F.2d at 1171.

The court of appeals' reference was to *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976) where, in a case arising prior to *Oliphant*, the court of appeals held that the Quechan Tribe had forsworn in its constitu-

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federal crime. The statute does not speak to tribal legislative authority. Enacted in 1960, it was intended as a criminal trespass statute, providing federal criminal prosecution of all non-Indians who trespass on Indian trust lands to hunt or fish. It was entirely reasonable for Congress not to make it a crime to enter reservation fee land where the United States does not hold legal title.

As the Court decided in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 205-206 (1978), Section 1165 was enacted because "non-Indians are not subject to the [criminal] jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges." S. Rep. No. 1686, 86th Cong., 2d Sess. (1960). That a tribe lacks criminal enforcement authority and that Congress has refrained from exercising its power does not entail that tribes have no legislative power to prescribe civil substantive rules. *Compare* 18 U.S.C. § 1154 (*United States v. Mazurie*, 419 U.S. 544 (1975)) providing a specific delegation of legislative authority to tribes to permit liquor sales on reservations, and making violations of *tribal* ordinances a *federal* crime.

A decision by Congress to limit federal criminal enforcement to a subject matter less extensive than the scope of tribal legislative authority does not itself diminish tribal legislative power. Put differently, an act is not made lawful simply because it is not a federal crime. The 1960 statute does not divest tribal legislative bodies of any existing powers.

tion any power to try non-members for violation of tribal law. The Court continued:

> Nor, in view of the foregoing, may the Quechan Tribe cause any non-member who enters the reservation to forfeit his weapons or any other property as a consequence of violating tribal law. '[A]s Mr. Justice Bradley aptly pointed out in *Boyd [Boyd v. United States,* 116 U.S. 616 (1886)], a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.' *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 700 . . . (1965).

531 F.2d at 411.

The issue whether a forfeiture provision in a tribal hunting and fishing code is "quasi-criminal," is vastly more complicated, we believe, than the Ninth Circuit's discussion would indicate. Recent decisions of this Court demonstrate that the question of whether a particular penalty is civil or criminal turns largely on legislative intent. *United States v. Ward,* .... U.S. ...., 65 L. Ed. 2d 742 (June 27, 1980). It is therefore particularly dangerous to generalize in the absence of a specific legislative enactment. It is not our purpose in this brief to definitively address the issue; we attempt only to demonstrate that it is of sufficient complexity that it should be left to a future case where it is actually presented.

In condemning civil forfeiture provisions as "quasi-criminal," the court of appeals relied on a century-old decision of this Court, *Boyd v. United States,* 116 U.S. 616 (1886). *Boyd,* however, is of questionable validity today. As one commentator notes:

> When Justice Bradley announced in *Boyd* that forfeiture proceedings, "though they may be civil in form, are in their nature criminal," (116 U.S. 616, 633-34) he introduced an unnecessary and dangerous dictum into the law. For the forfeiture involved in *Boyd,* though a penalty for reasons set forth below, definitely was not a criminal penalty . . . The term

> "quasi-criminal," which the Court coined to describe the proceedings, has muddied legal waters ever since.

Clark, *Civil and Criminal Penalties and Forfeitures: A Frame-Work for Constitutional Analysis,* 60 Minn. L. Rev. 379, 414 (1976). Last term, this Court criticized *Boyd* in *United States v. Ward, supra:*

> Read broadly, *Boyd* might control the present case. This Court has declined, however, to give full scope to the reasoning and dicta in *Boyd,* noting on at least one occasion that "Several of *Boyd's* express or implicit declarations have not stood the test of time." *Fisher v. United States,* 425 U.S. 391, 407 (1976).

65 L. Ed. 2d at 752.

Moreover, in a second line of cases, this Court has sustained a series of "civil" penalties and forfeiture provisions on the ground that they were "remedial" rather than "punitive" and hence not subject to the criminal procedure protections in the Constitution. *See, e.g., One Lot Emerald Cut Stones v. United States,* 409 U.S. 232 (1972); *Helvering v. Mitchell,* 303 U.S. 391 (1938).[11]

In *Helvering,* Justice Brandeis observed:

> Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

303 U.S. at 400.

Finally, in *United States v. Ward,* 65 L. Ed. 2d 742 (June 27, 1980), the Court strongly indicated that at least initi-

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11. An additional line of cases has upheld various forfeiture proceedings on the ground that they operate *in rem,* and not against the person. *See e.g., Various Items of Personal Property v. United States,* 282 U.S. 577 (1931); *Goldsmith-Grant Co. v. United States,* 254 U.S. 505 (1921); *Dobbins Distillery v. United States,* 96 U.S. 395 (1877). *See particularly, Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, *rehearing denied,* 417 U.S. 977 (1974).

ally, the proper inquiry in the issue was to determine legislative intent. (Though the Court noted that a sanction might be so punitive in effect as to negate that intention.) The court of appeals' analysis is particularly objectionable in this regard because it had no tribal provision before it.

Finally, we would suggest that the key inquiry, consistent with this Court's opinion in *Oliphant,* is whether an exercise of a civil forfeiture provision would be inconsistent with the tribe's status or inconsistent with the superior interests of the United States. That inquiry should be made with respect to a specific tribal forfeiture provision, not by generalized labels such as the one utilized by the court of appeals. A remedial forfeiture provision could presumably be sustained.

II. The Crow Tribe Beneficially Owns the Bed and Banks of the Bighorn River.

It is well-settled that Congress has power to reserve to Indian tribes title to the beds and banks of navigable rivers. *Choctaw Nation v. Oklahoma,* 397 U.S. 620, *reh. den.* 398 U.S. 945 (1970); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 87 (1918); *Shively v. Bowlby,* 152 U.S. 1, 47-48 (1894). This Court and the lower courts have consistently rejected attempts to convert the "equal footing" doctrine to a controlling legal principle and confirmed that it is the intention of the parties in setting aside the reservation which controls. Thus, in *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918), this Court rejected the argument that the public navigable waters and submerged lands surrounding the Annette Islands Reserve were held in trust by the United States for a future state, 248 U.S. 79-80, and held that an 1891 statute designating the "body of lands known as the Annette Islands" as an Indian reservation, also reserved to the tribe the "adjacent waters and the submerged lands" between and surrounding the various islands composing the Reserve. 248 U.S. at 87. The Court concluded that these submerged

lands and waters were necessarily included to fulfill the congressional purpose to make the Indians "self-sustaining and advance to the ways of civilized life." 248 U.S. at 89.

More recently, in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), this Court determined that various Oklahoma tribes owned the bed of the Arkansas River where that river is within, or forms a boundary of, their reservation. For present purposes, the most germane part of *Choctaw Nation* concerned the portion of the Arkansas River which lies completely within "one undivided tract of [reservation] land described . . . by exterior metes and bounds." 397 U.S. at 628. The Court concluded that all of the lands within those boundaries, including the river, were clearly encompassed within the grant and found that any contrary argument was strained. The Court emphasized that the "natural inference" from the grants creating the reservation was that all the land within the described metes and bounds was conveyed, including the banks and beds of the rivers.[12] 397 U.S. at 634. Indeed, the Court had

12. The State argues that the Crow in treaty times were more involved in hunting than in fishing and that the 1868 treaty therefore did not reserve the riverbed and its fishery to them. (State Br. at 21) The short answer to this contention is that the cases do not require fish to be "a mainstay of their diet" (*Ibid*) in order to construe a treaty as reserving the riverbed to tribal ownership. The tribes involved in *Choctaw Nation*, for example, were not primarily dependent on fishing when the treaties with them were made, nor were they involved in oil and gas development.

In *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976, the court of appeals, although conceding that the Crows were primarily big game hunters, persuasively rejected the State's argument:

> By establishing a reservation as a "permanent home" for the Crow Indians, . . . the Government manifestly intended to set aside lands which would provide the tribe with the food and natural resources upon which their livelihood depended . . . We find it inconceivable that the United States intended to withhold from the Indians the right to sustain themselves from any source of food which might be available on their reservation. It must have been no mystery to the Government that the Crow Tribe, whose nomadic ways they sought to change, might eventually be forced to derive their existence from a source other than big game, should the large herds of buffalo and elk roaming the plains become extinct by accident of nature or decimation by man.

previously determined that where a Reservation is described as "a tract of country one mile in width on each side of the Klamath River . . . it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time exclude the river." *Donnelly v. United States,* 228 U.S. 243, 259 (1913).

With respect to the Crow Reservation, the circumstances supporting the conclusion that the bed and banks of the Bighorn River are held in trust for the Tribe are particularly compelling. In contrast to the situation before this Court in *United States v. Holt State Bank,* 270 U.S. 49 (1926), the Crow Reservation was established by an 1868 treaty which formally and specifically set aside Crow lands for the "absolute and undisturbed use and occupancy" of the Tribe and its members.[13] Like the rivers considered in *Donnelly* and *Choctaw Nation,* the Bighorn River lies completely encompassed within one undivided tract of land described by metes and bounds. The natural inference that such a fully enclosed riverbed was to be included in the reservation is even stronger than in *Choctaw Nation* because of the fact that these reservation lands were Crow territory when the treaties with the United States were negotiated and ratified. In such circumstances, as this Court made clear in *United States v. Winans,* 198 U.S. 371, 381 (1905), "the treaty was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted." *See also, Washington v. Washington State Commercial Fishing Vessels Association,* 443 U.S. 658, 680 (1979). In this case, the issue is not whether the riverbed was *granted to* the tribes, but rather, whether

13. As the Solicitor General explains in his brief for the United States, the Court in *Holt State Bank* emphasized that "[t]here was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters." 270 U.S. at 58. *Holt State Bank* is otherwise distinguishable for reasons set out by the United States in its brief.

the tribes ceded the land to the United States to be held in trust for a future state. It is the *state* therefore which must bear the burden of showing a specific cession.

Moreover, since the Crow Reservation was set aside by treaty, the understanding of the Tribe itself is germane. A treaty between the United States and an Indian tribe is essentially a contract between two sovereign nations, and "it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the [treaty]." *Washington v. Washington Commercial Fishing Vessel Association*, 443 U.S. at 675. Further, as the Court emphasized in *Fishing Vessel Association*, since the United States, in treaty negotiations with Indian tribes, has a responsibility to avoid taking advantage of the other side, the treaty must be construed "in the sense in which [it] would naturally be understood by the Indians." 443 U.S. at 676. Montana can hardly credibly argue that the natural understanding of the Crows was that the treaty, setting aside the described reservation for the "exclusive use" of the Tribe and its members, would have the effect of reserving submerged lands under the Bighorn River for a future state.[14]

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14. Montana argues that the subsequent allotment of lands within the Crow Reservation, portions of which came into the hands of non-Indians in fee status, confirms Montana's ownership of the Bighorn River. But this contention was emphatically rejected by this Court in *Choctaw Nation*. The allotment scheme opening the Oklahoma reservations to settlement at the turn of the century provided "for the final dissolution of the tribes", "the termination of tribal affairs" and "disposition of all [tribal] lands." 397 U.S. at 627. If the Oklahoma Tribes, which were largely dissolved, stripped of governmental powers except for limited purposes, and divested of virtually all tribal lands, nonetheless retain ownership of a riverbed within the reservation, the Crow Tribe must surely retain ownership of the bed of the Bighorn River. *See also Omaha Tribe v. Village of Walthill*, 334 F.Supp. 823, *aff'd*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

Puyallup Tribe, Inc. v. Washington State Game Department, 433 U.S. 165 (1977) (Puyallup III), relied upon by the State of Montana, is not inconsistent with this result. Montana attempts to rely on the Court's statement in footnote 12 that a claim by the Puyallup Tribe that it retained trust status title to the bed of the Puyallup River would be "at

Finally, the virtually unvarying application of the above cases by lower courts has been to construe treaties and statutes setting aside reservations embracing or adjacent to navigable bodies of water as reserving to the tribes the submerged lands. For example, in *Montana Power Co. v. Rochester*, 127 F.2d 189, 192 (9th Cir. 1942), the court of appeals held that the 1855 Treaty of Hell's Gate reserved the bed of the Flathead Lake for the Flathead Tribe:

> It is inadmissible to suppose that the United States, having agreed to hold this area in trust for the exclusive use and benefit of the Indian tribes, intended to put the tribes at the mercy of the future state, the policy of which was necessarily unknown at the time of the treaty . . . ; for by adoption of a proprietary policy the state might substantially interfere with, if not foreclose, use of the shore by the Indians in the conduct of their fishing operations.

See also Moore v. United States, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947); *United States v. Romane*, 255 F. 253 (9th Cir. 1919); *United States v. Boynton*, 53 F.2d 297 (9th Cir. 1931); *United States v. Stotts*, 49 F.2d 619 (9th Cir. 1930); *United States v. Pollman*,

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odds with the otherwise uncontradicted findings below." Montana assumes that the finding referred to was the finding that all but 22 acres had been alienated. Petitioner's brief at 26. Montana's reading of the footnote is not persuasive. First, it assumes that the Supreme Court in *Puyallup III* intended to undermine its holding in *Choctaw Nation* that allotment was irrelevant to the ownership of the bed of the river. Second, the Supreme Court specifically identified the finding it refers to—70 Wn.2d at 253, 422 P.2d at 759 (1967) (*Puyallup I*). The Washington Supreme Court there noted:

The trial court also found:

> *All of the lands* within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress . . . with the exception of two small tracts which are presently being utilized as a cemetary for members of the federal organization known at the "Puyallup Tribe." (emphasis added)

We believe it more logical to read note 12 to indicate that the lower court had held that *all* of the lands, including the bed of the river, had been sold. Since the Puyallup Tribe had not appealed, the Court was simply indicating that it was bound by that finding.

364 F. Supp. 995 (D. Mont. 1973); *United States v. Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970); *United States v. City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971).

Each of these cases is, of course, unique. Recognition of the retained trust ownership has been based on the language in the documents setting aside the reservations, the exceptional circumstances creating them, the historical facts, and upon the general principles that Indian reservations were set aside to provide tribes with a self-sustaining homeland by preserving for the tribe basic natural resources. The point we would emphasize is that because of these cases, as well as the Supreme Court cases decided above, the various tribes in this country have settled expectations concerning their rights to the bed and banks of navigable bodies of water within the reservations.[15] This Court should hesitate to upset those expectations. *See State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 382 (1977).

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15. The State's implication (State Br. at 19, 22-23; *also see Amicus Curiae Brief* of the State of Washington at 9-13), that ownership of the riverbed by the Tribe for purposes of exploiting mineral or fishing resources somehow deprives the United States of power to protect navigation and public commerce and permits the Tribe to obstruct use of the river as a public highway was summarily rejected in *Choctaw Nation*, 397 U.S. at 635.

CONCLUSION

Amici respectfully suggest that the decision of the court of appeals below should be affirmed.

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Supreme Court of the United States

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Supreme Court No. 79-1128

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THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA,

Respondents,

vs.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,

Petitioners.

—o—

BRIEF OF AMICI CURIAE IN SUPPORT OF STATE OF MONTANA

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In The

Supreme Court of the United States

October Term, 1979

Supreme Court No. 79-1128

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA,

Respondents,

vs.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,

Petitioners.

BRIEF OF AMICI CURIAE IN SUPPORT OF STATE OF MONTANA

QUESTIONS PRESENTED

I.

Does an Indian treaty, which makes no specific reference to the ownership of the beds of navigable rivers running through an Indian reservation, impliedly deprive a subsequently formed state of the ownership of the river bed to which the state would otherwise be entitled under the Equal Footing Doctrine, as reaffirmed in *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977)?

II.

A. May a tribe regulate or prohibit hunting and fishing by non-members on lands within a reservation after such lands have been sold to non-members pursuant to federal law?

B. If tribal regulation of non-member hunting and fishing is authorized, must such regulation comport with

equal protection and due process guarantees as embodied in the United States Constitution and the Indian Civil Rights Act?

———o———

STATEMENT OF INTEREST OF AMICI CURIAE

The states who join in this brief do so because they have Indian reservations within their boundaries which abut or contain navigable waters and/or they have Indian tribes residing within their boundaries that have or may attempt to regulate non-member hunting and fishing on non-member land on the reservation.

For example, in the State of Idaho there are four Indian reservations, two of which contain large amounts of land owned by non-members of the respective tribes. The Nez Perce Reservation contains approximately 756,000 acres, of which about 669,000 acres or 88.5% is owned by non-members of the tribe. The Coeur d'Alene Reservation contains approximately 345,000 acres, of which approximately 275,000 or about 80% is owned by non-members of the tribe. Almost a million acres of land lying within Idaho's Indian reservations are owned by non-Indians.

One of Idaho's most important river fisheries, the Clearwater River, runs across the northern and eastern portions of the Nez Perce Reservation. The boundaries of the Coeur d'Alene Reservation include several navigable bodies of water, such as the St. Joe River, Coeur d'Alene Lake (one of the largest natural lakes in Idaho) plus the smaller Benewah, Chatcolet, and Hidden Lakes. The

Blackfoot River forms a portion of the northeastern and northern boundaries of the Fort Hall Indian Reservation, with the Snake River forming the northwestern boundary.

For the above reasons, the ownership of the beds of navigable waters and a tribe's right to regulate non-member hunting and fishing on non-member lands within a reservation are of great interest to citizens of the amici states.

STATEMENT OF THE CASE

The facts involved are set forth in the Statement of the Case found in Montana's Petition for Certiorari, pp. 6-10.

It should be emphasized that approximately 30% of the Crow reservation lands have been sold to non-Crows, including lands abutting the Big Horn River. Thus, along various parts of the river, neither the Crows nor the United States owns the riparian land.

SUMMARY OF ARGUMENT

The first issue is whether the State of Montana under the Equal Footing Doctrine acquired ownership of the bed and banks of the Big Horn River within the Crow Indian Reservation upon its entry into the Union. A long and impressive line of authority from this Court, culminating with *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977), supports the district court's decision that title to

the bed and banks of the Big Horn River is held by the State of Montana. The decision of the Ninth Circuit Court of Appeals is contrary to this line of authority and should be reversed.

The ninth circuit, in holding that title remains in the United States in trust for the Crow Tribe, relied upon this Court's decision in *Choctaw Nation v. Oklahoma,* 397 U. S. 620 (1970). The ninth circuit's reliance upon *Choctaw Nation* was misplaced. That case presented exceptional circumstances which led this Court to conclude that the United States intended to convey fee title to the bed of the Arkansas River to the Choctaws. No such exceptional circumstances exist in the present case to overcome the presumption that the United States retained ownership of the bed and banks of the Big Horn River in trust for the future State of Montana.

The second issue concerns the validity of Crow Tribal Resolution 74-05 prohibiting non-members from hunting and fishing on non-member lands within the Crow Reservation. The Crow Tribe does not possess the authority to so limit the use of non-member lands within the reservation.

Inherent sovereignty cannot be the source of such authority because a tribe's sovereign powers are limited to governing the tribe, tribal lands, and tribal members.

The Crow treaties of 1851 and 1868 as modified by the Crow Allotment Act of 1920, 41 Stat. 751, likewise grant no authority to the tribe to prohibit hunting and fishing on non-member lands within the reservation. As a result of the allotment act, ownership of one-third of the reser-

vation lands passed to non-Crows. There is nothing to indicate that Congress intended that the owners of these lands receive less than full rights of property ownership, including the right to hunt and fish in season and to grant or deny access to others.

Passage of 18 U. S. C. § 1165 did not extend tribal jurisdiction to non-member fee lands within the Crow Reservation. This statute makes it a trespass offense to go upon lands owned by Indians or held by the United States in trust for the Indians or lands reserved for use by Indians. The statute has no application to non-member fee lands within the reservation.

For the above reasons Tribal Resolution 74-05 is totally invalid and the ninth circuit decision upholding it in part should be reversed.

If this Court should find that the Crow Nation has the power to regulate the hunting and fishing activities of non-members on their own lands, such regulations must comport with rights of due process and equal protection of the law. Tribal Resolution 74-05 is patently discriminatory against non-Crows and should not be upheld by this Court.

ARGUMENT

I.

The State of Montana acquired ownership of the bed and banks of the Big Horn River within the exterior boundaries of the Crow Indian Reservation under the Equal Footing Doctrine.

At issue here is the title to the bed and banks of the Big Horn River inside the Crow Indian Reservation. The Ninth Circuit Court of Appeals says that it is held in trust by the United States for the use and benefit of the Crow Tribe of Indians. *United States v. Montana,* 604 F. 2d 1162 (9th Cir. 1979). The United States District Court for the District of Montana says it is not. *United States v. Montana,* 457 F. Supp. 599 (D. C. Mont. 1976). The district court decision is consistent with a long and impressive line of authority supporting the conclusion that under the Equal Footing Doctrine the United States held title to the beds of navigable waters in trust for the future states. *Oregon v. Corvallis Sand & Gravel Co.,* 429 U. S. 363 (1977); *United States v. Holt State Bank,* 270 U. S. 49 (1925); *Scott v. Lattig,* 227 U. S. 229 (1913); *Shively v. Bowlby,* 152 U. S. 1 (1894); *Barney v. Keokuk,* 94 U. S. 324 (1877); *Weber v. Harbor Comm'rs.,* 85 U. S. (18 Wall.) 57 (1873); *Pollard's Lessee v. Hagan,* 44 U. S. (3 How.) 212 (1845); *Martin v. Waddell,* 41 U. S. (16 Pet.) 367 (1842). These cases also support the conclusion that upon Montana's entry into the Union, title to the bed and banks of the Big Horn River vested in the new state.

The district court and the appellate court both recognized that prior to 1851, title to the Big Horn riverbed was in the United States. 457 F. Supp. at 601; *United States v. Finch,* 548 F. 2d 822, 827 (9th Cir. 1976). The ultimate fee to the Crow Indian Reservation lands was held by the United States subject to a right of occupation by the Indians. *Johnson v. McIntosh,* 21 U. S. (8 Wheat.) 543, 574 (1823); *Worcester v. Georgia,* 31 U. S. (6 Pet.) 515 (1832). Prior to Montana's entry into the Union the Congress of the United States exercised an absolute power to legislate

for the territories within which the Crow lands were located. *National Bank v. County of Yankton,* 101 U. S. 133 (1886); *United States v. City & County of San Francisco,* 310 U. S. 16 (1940). During the territorial period, Congress was capable of conveying public lands, including the beds and banks of navigable waters. However, such was not the practice:

> The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union.

Shively v. Bowlby, 152 U. S. 1, 58 (1894).

The position of the United States with respect to state ownership of the beds and banks of navigable waters was described by this Court in a straightforward manner in *Scott v. Lattig,* 227 U. S. 229 (1913):

> Coming to the effect to be given to the admission of Idaho as a state and to the disposal of the fractional subdivisions on the east bank, it is well to repeat that the Snake river is a navigable stream, for there is an important difference between navigable and non-navigable waters in such a connection. Thus, Rev. Stat., § 2476, U. S. Comp. Stat. 1901, p. 1567, which is but a continuation of early statutes on the subject (Acts May 18, 1796, 1 Stat. at L. 464, Chap. 29, § 9, U. S. Comp. Stat. 1901, p. 1567; March 3, 1803, 2 Stat. at L.

> 229, Chap. 27, § 17), declares: "All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both;" and of this provision it was said in *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 288, "the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways." Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty, and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations, and that each new state, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones. *St. Clair County v. Lovingston*, 23 Wall. 46, 68; *Barney v. Keokuk*, 94 U. S. 324, 338; *Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387, 434-437; *Shively v. Bowlby*, 152 U. S. 1, 48-50, 58; *McGilvra v. Ross*, 215 U. S. 70.

227 U. S. at 242-243.

The 1851 Fort Laramie Treaty recognized Crow Indian claims to the lands described therein, *Crow Tribe of Indians v. United States*, 284 F. 2d 361, 371 (1960); *Fort*

Berthold Indians v. United States, 71 Ct. Cl. 308, 332 (1930), but did not create a reservation for the Indians. *Crow Tribe* at 370; *United States v. Northern Pac. Ry. Co.,* 311 U. S. 317, 349 (1940). The Crow Reservation was established by the 1868 Fort Laramie Treaty, 15 Stat. 649. A significant portion of the Big Horn River lies within the present boundaries of that reservation. *United States v. Montana,* 604 F. 2d at 1164. It is undisputed that the Big Horn is a navigable stream.

The issue is whether the United States transferred beneficial ownership of the bed to the Crow Tribe by the treaties of 1851 and 1868, or whether it retained ownership of the bed and banks as public lands, which passed to the State of Montana upon its admission to the Union. *United States v. Finch,* 548 F. 2d 822, 827 (1976).

It has been repeatedly held that title to the beds and banks of all navigable waters within the territories of the United States are held in trust to be turned over to the respective states upon their admission to the Union. *Oregon v. Corvallis Sand & Gravel Co.,* 429 U. S. 363 (1977); *United States v. Holt State Bank,* 270 U. S. 49 (1925); *Scott v. Lattig,* 227 U. S. 229 (1913); *Shively v. Bowlby,* 152 U. S. 1 (1894); *Barney v. Keokuk,* 94 U. S. 324 (1877); *Weber v. Harbor Comm'rs.,* 85 U. S. (18 Wall.) 57 (1873); *Pollard's Lessee v. Hagan,* 44 U. S. (3 How.) 212 (1845); *Martin v. Waddell,* 41 U. S. (16 Pet.) 367 (1842). Nowhere does one find a general exception to this principle for Indian reservations, even though the public lands of the west contained numerous Indian reservations, many of which embraced or bordered upon navigable waters. Had there ever been an intention on the part of the United

States to make such an exception, surely that intent would have been clearly expressed at some point in our nation's history. The court below has cited no such authority, nor does any such authority appear to exist.

This Court, in the case of *United States v. Holt State Bank*, 270 U. S. 49 (1926), considered whether the State of Minnesota, upon admission to the Union in 1858, acquired ownership of the bed of a navigable lake located within an Indian reservation. The opinion states:

> [T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances, when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

270 U. S. at 55.

The Court in *Holt State Bank* reviewed the Treaties of 1854, 10 Stat. 1109, and 1855, 10 Stat. 1165, under which the Red Lake Indian Reservation came to be known and recognized as a reservation for the Chippewa Indians. The Court concluded:

> There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future state. Without doubt the Indians were to have access to the navigable waters and to be entitled to use them in ac-

> customed ways; but these were common rights vouchsafed to all, whether white or Indian. . . .

270 U. S. at 58-59.

The case of *Choctaw Nation v. Oklahoma,* 397 U. S. 620 (1970) presented an issue similar to that in *Holt State Bank.* This Court held in *Choctaw Nation* that the Choctaw and Cherokee tribes had been granted title to lands beneath the navigable waters of the Arkansas River. *Choctaw Nation* at 634. The facts in *Choctaw Nation,* however, presented *exceptional circumstances. Choctaw Nation* at 639 (concurring opinion). The facts were that:

> [T]he United States promised to convey the land to the Choctaw Nation in fee simple "to inure to them while they shall exist as a nation and live on it." In addition, the United States pledged itself to secure to the Choctaws the "jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-334.

397 U. S. at 625.

The exceptional circumstances present in *Choctaw Nation* overcame the presumption that the United States retained ownership of the river bed in trust for the future state. 397 U. S. at 635.

The facts in the present case do not approach the exceptional circumstances in *Choctaw Nation.* There is nothing in the 1868 treaty which approaches a grant of land underlying the Big Horn River; nor is there anything

evincing a purpose to depart from the established policy of treating such lands as held for the benefit of the future state. *See Holt State Bank,* 270 U. S. at 58-59. The district court was correct in its holding that the bed and banks of the Big Horn River are owned by the State of Montana.

II.

The Crow Tribe does not have the power to preclude non-members from hunting and fishing on non-member lands within the Reservation.

A. The Crow Tribe does not possess the inherent sovereign power to prohibit hunting and fishing on lands owned by non-members.

The inherent sovereignty possessed by The Crow tribe is over the tribe and its members and does not extend to non-members.

This Court in *United States v. Wheeler,* 435 U. S. 313, 323 (1978) said:

> Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.
>
> * * *
>
> In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. [Citation omitted.]

Tribes have been implicitly divested of sovereignty in several instances involving relations between an Indian tribe and non-members. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978); *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543 (1923); *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810).

In *Oliphant* this Court held that the tribe did not have criminal jurisdiction over non-Indians. "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status,'" 435 U.S. at 210. This Court then cited with approval Justice Johnson's opinion in *Fletcher v. Peck,* 6 Cranch at 147 that Indian sovereignty is limited to governing themselves and does not extend to non-members.

The fact that the state and not the tribe possesses sovereign power over non-Indians and their lands within the state's borders is indicated by this Court's statement in *Oliphant,* 435 U.S. at 212:

> "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these." *United States v. Kagama,* 118 U.S. 375, 379 (1886).

Indian reservations are part of the state within which they are located. The state's law, both civil and criminal, have the same force and effect on Indian reservations as elsewhere within the state, except these laws have limited application to Indians. *Surplus Trading Co. v. Cook,* 281 U. S. 647 (1929). In *Mescalero Apache Tribe v. Jones,* 411 U. S. 145, 148 (1973) this Court said:

> The upshot has been the repeated statements of this Court to the effect that even on reservations state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. *Organized Village of Kake, supra,* at 75, 7 L. Ed. 2d 573; *Williams v. Lee,* 358 U. S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959); *New York ex rel. Ray v. Martin,* 326 U. S. 496, 499, 90 L. Ed. 261, 66 S. Ct. 307 (1946); *Draper v. United States,* 164 U. S. 240, 41 L. Ed. 419, 17 S. Ct. 107 (1896).

See Moe v. Salish & Kootenai Tribes, 425 U. S. 463 (1976); *Fort Mojave Tribe v. San Bernadino County,* 543 F. 2d 1253 (9th Cir.), *cert. denied,* 430 U. S. 983 (1977); *Oklahoma Tax Comm'n. v. Texas Co.,* 336 U. S. 342 (1949).

The state has historically had the police power to regulate hunting season's harvest regulations and to determine whether or not hunting is allowed in specific sections of the state. *Hughes v. Oklahoma,* 441 U. S. 322 (1979); *LaCoste v. Department of Cons.,* 263 U. S. 545 (1924). In the case at bar, Montana has been exercising jurisdiction over hunting and fishing on non-Indian lands within the reservation. *United States v. Montana,* 457 F. Supp. 599, 610 (D.C. Mont. 1976), *rev'd,* 604 F. 2d 1162 (9th Cir. 1979). If a portion of a state is open to hunting and fishing the state cannot prohibit citizens of the state or of another

state from hunting or fishing if they meet the licensing requirements. The right to determine who may hunt on a particular parcel during the open season belongs to the landowner or lessee. These rights do not interfere with tribal self-government. To hold otherwise is to give the tribe a greater sovereign power than that possessed by the state. The district court was correct when it held that: "The tribe cannot preempt a power which rests with the state government simply by enacting an ordinance inconsistent with the power and authority of the state, and consistent with tribal self-government, absent the authority of Congress." 457 F. Supp. at 610. *See Fisher v. District Court,* 424 U. S. 382, *reh. denied,* 425 U. S. 926 (1976).

B. The Treaties of 1851 and 1868 do not provide the tribe with the power necessary to make Tribal Resolution 74-05 valid.

1. 1851 Treaty

The purposes of the 1851 Treaty were to gain safe passage across the lands of the various Indian tribes; recompense the Indians for the loss of buffalo, other game animals, timber and forage; delineate tribal boundaries, promote peace between the various tribes, and identify the Indians who committed depredations against whites. The treaty did not create a reservation. *Crow Tribe v. United States,* 284 F. 2d 361, 364, 366, 368 (1970). The only reference to hunting and fishing in the treaty is contained in Article 5. It provides that the eight tribes signing the treaty "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 11 Stat. 749. This wording is certainly

not an express grant of authority to the tribe to regulate hunting and fishing on non-member lands, nor can one be implied. The appellate court recognized that whites and other Indian tribes undoubtedly hunted and fished within the treaty designated territory and that the Crows hunted outside of their treaty designated territory. 604 F. 2d at 1167. Thus, the tribe did not obtain exclusive hunting and fishing rights under the 1851 Treaty.

2. 1868 Treaty

The appellate court correctly held that the purpose of the 1868 Fort Laramie Treaty, 15 Stat. 649, was to reduce the size of the Crow territory designated by the 1851 Treaty. 604 F. 2d at 1166, 1167.

Article 2 of the treaty created a reservation for the Crows and provided that it, ". . . is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; . . ." It is clear that the Indians' right to the absolute and undisturbed use and occupation of the lands was altered by the passage of the General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. § 331 et seq., and the Crow Allotment Act of 1920, 41 Stat. 751. Congress obviously realized that the provisions for sale of alloted lands would lead to their purchase and occupation by non-members of the Crow tribe. This is exactly what happened. Approximately 690,000 acres, or about one-third of the lands within the reservation, are now owned by non-Crows.

The Ninth Circuit Court of Appeals, in discussing the Allotment Acts, said:

> While neither of these Acts, nor any other to which our attention has been called, explicitly qualifies the Tribe's rights over hunting and fishing, it defies reason to suppose that Congress intended that non-members who reside on fee patent lands could hunt and fish thereon only by consent of the Tribe. So far as the record of this case reveals, no efforts to exclude completely non-members of the Crow Tribe from hunting and fishing within the reservation were being made by the Crow Tribe at the time of enactment of the Allotment Acts.

604 F. 2d at 1168.

Landowners have always possessed the right not only to hunt on their own lands but also to grant or deny access to others. These rights are not limited to the land on which they reside, but extend to all of the lands they own. There is nothing in the record that indicates that Congress intended that purchasers under these Acts were to receive less than the full rights of property ownership.

Furthermore, Congress wanted a peaceful assimilation to result from the Allotment Acts. *Organized Village of Kake,* 369 U. S. 60, 72 (1962). This would certainly not be the case if the Crow tribe can exclude non-member non-residents from hunting or fishing on the non-members' own lands. Congress was also aware that non-tribal members could obtain more than one parcel of land. They surely did not intend that an owner could hunt only on the parcel where he resided but be prohibited from hunting on the second parcel where he did not reside. Yet, this is precisely what the Ninth Circuit Court of Appeals held. 604 F. 2d at 1169.

Article 4 contains the only other reference to Indian

hunting and fishing rights in the 1868 Treaty. It provides that:

> [The Indians] will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

This provision reserved for the Indians "off reservation" hunting and fishing rights on the lands acquired from the Crows by the United States. The right reserved was qualified in that the lands must be unoccupied, owned by the United States, game must be present, and peace exist. Article 4 does not refer to "on reservation" hunting and fishing. It was not necessary for the Indians to reserve the right to hunt or fish on the reservation but it was necessary to reserve this right on the lands they ceded to the United States which were outside of the reservation. It is respectfully submitted that the 1868 Treaty does not contain an express grant of authority which would allow the Crow tribe to prohibit non-tribal members from hunting or fishing on their own lands.

C. 18 U.S.C. § 1165 by itself or in conjunction with the Treaties does not give the Crow Tribe the power to control hunting and fishing on the lands of non-tribal members.

18 U.S.C. § 1165 does not and never was intended to extend tribal jurisdiction to fee lands owned by non-tribal members within the boundaries of the Crow Reservation. 18 U.S.C. § 1165, Hunting, trapping, or fishing on Indian land, says:

> Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom shall be fined. . . .

The statute is limited to lands owned by Indians and lands held by the United States in trust for the Indians or lands reserved for use by Indians. If Congress had intended to extend jurisdiction to non-Indian lands they could easily have done so by incorporating into § 1165 the definition of Indian country: "all land within the limits of any Indian reservation under the jurisdiction of the United States government notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U. S. C. § 1151. The original bill (H. R. 7240), predecessor to 18 U. S. C. § 1165, read in part:

> . . . or upon any Indian reservation or lands belonging to or occupied by any tribe or group of Indians under authority of the United States, or any Indian allotment, while title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the tribe or the allottee without the consent of the United States, for the purpose of hunting, trapping, or fishing, or for the removal of game, peltries, or fish.

Cong. Rec., H. R. 7240, 85th Cong. 2d Sess., Vol. 104, p. 18317. An amendment was proposed in the subcommittee of the House Committee on the Judiciary that read in part:

> "Whoever, without lawful authority or permission, goes upon *Indian country as defined in Sec.* 1151 of

> this title, for the purpose of hunting, trapping, or fishing, or for the removal of game peltries, or fish. . . ." (Emphasis added.)

The Department of Interior recommended in a letter dated May 23, 1958, against the use of the phrase "Indian Country" as defined in 18 U. S. C. § 1151. The department believed such language would result in a contention that the law was intended to apply to non-Indian land within a reservation. They pointed out that a previous report (House Report 2593, 85th Congress, 2d Session) had been worded so as to avoid any argument that the bill would apply to non-Indian land. Appendix J to Montana's Pet. for Cert., p. 123.

House Report 2593 states the purpose of H. R. 7240 is to make it unlawful to go upon Indian land to hunt, trap, or fish without the consent of the individual Indian or tribe. The House Report in its statement of the problem said:

> Indian property owners should have the same protection as other property owners, for example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. This is for the reason that Indian tribal law is enforceable against Indians only; not against non-Indians.
>
> • • •
>
> Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. Further, there are no Federal laws which can be invoked against trespassers.

H. R. 2593, 85th Cong., 2d Sess.

Subsequent House Report 625, 86th Congress, 1st Session, and Senate Report 1686, 86th Congress, 2d Session, are very similar and again refer to "Indian lands" and "Indian property owners" and not to "Indian country." In *Oliphant,* this Court in referring to S. Rep. 1686, 86th Cong., 2nd Sess. 2-3 (1960), said: "The legislation (28 U. S. C. § 1165) will give to the Indian tribes and to *individual Indian owners* certain rights that now exist as to others, and fills a gap in the present law for the protection of *their property.*" 435 U. S. at 206. (Emphasis added.)

Prior to the ninth circuit decision, several other courts interpreted § 1165 to be confined to lands which are owned by Indians or held in trust for their benefit. *State v. Baker,* 464 F. Supp. 1377 (W. D. Wis. 1978); *United States v. Bouchard,* 464 F. Supp. 1316 (W. D. Wis. 1978); *United States v. Pollman,* 364 F. Supp. 995 (1973); *Donahue v. California Justice Court,* 93 Cal. App. 310 (1971).

The question of whether § 1165 preempts state regulation of fishing and hunting by a non-Indian within a reservation was addressed in *State v. Danielson,* 427 P. 2d 689 (Mont. 1967). There, the non-Indian defendant claimed that the state did not have jurisdiction to try him for killing elk out of season on the Crow reservation. The Montana Supreme Court in holding that the state had jurisdiction to enforce its fish and game regulations against nonmembers of the Crow tribe said:

> It is significant to note that section 1165 does not directly prohibit hunting and fishing but makes the act of going upon the Indian reservation a violation if

> done for the purpose of hunting or fishing. Section 1165 expressly permits hunting and fishing on Indian reservations without additional federal regulation if proper permission or authorization is given for the entry. Therefore, section 1165 must be considered to be a statute providing a penalty for trespass to an Indian reservation and not an attempt by Congress to enter the field of fish and game regulation.

427 P. 2d at 691.

In a subsequent case, *United States v. Sanford,* 547 F. 2d 1085 (9th Cir. 1976), the court held that § 1165 was designed to prevent encroachments on *Indian lands* and rejected the argument of the United States that § 1165 makes illegal the unauthorized killing of wildlife on an Indian reservation. The *Sanford* court said:

> Section 1165 does not represent an attempt by the federal government to enter the arena of fish and game regulation on Indian reservations; thus, the federal statute cannot be viewed as a prohibiting or conflicting act. Further, we are convinced that the application of Montana game laws to the activities of non-Indians on Indian reservations does not interfere with tribal self-government on reservations.

547 F. 2d at 1089.

Based on the wording of 18 U. S. C. § 1165, its legislative history, and pertinent case law, it is clear that the statute was designed only to protect against trespass on Indian lands. It clearly was not an attempt on the part of Congress to give the tribe power to regulate hunting and fishing on lands owned by non-members.

In *Quechan Tribe v. Rowe,* 531 F. 2d 408 (9th Cir. 1976), the court held that the tribe had authority to regulate entry upon the reservation for hunting or fishing pur-

poses. The *Quechan* case is clearly distinguishable from the instant case since at the time the events occurred (1971) all the land on the reservation was held in trust for the tribe. Therefore, *Quechan* clearly does not stand for the proposition that an Indian tribe can prohibit non-members from entering, hunting, trapping or fishing upon the lands of non-members.

United States v. Mazurie, 419 U. S. 544 (1975) is often cited for the proposition that an Indian tribe can regulate non-member activities on non-member lands within a reservation. The *Mazurie* case is distinguishable because it dealt with an express Congressional delegation of authority to tribes for the regulation of the distribution of alcoholic beverages within reservations. Even this express delegation was limited. It did not extend to fee patented lands within non-Indian communities nor to rights-of-way through reservations. 18 U. S. C. § 1154 (c). Also, tribal ordinances could not authorize a violation of state laws. 18 U. S. C. § 1161. 419 U. S. at 547. In the case at issue, there is no delegation by Congress to the Crow tribe of any power to prohibit hunting and fishing by non-members on lands owned by non-members within the reservation.

In order for Tribal Resolution 74-05 to be valid, it must be promulgated pursuant to a power possessed by the tribe. It is respectfully submitted that the tribe does not have inherent sovereign power over non-members or their lands, nor did the Crow tribe receive such power from the relevant treaties or statutes. Therefore, Tribal Resolution 74-05 is totally invalid and the ninth circuit's ruling upholding it in part should be reversed by this Court.

III.

Tribal Resolution 74-05 violates the equal protection and due process guarantees of the United States Constitution and the Indian Civil Rights Act.

A. Tribal Resolution 74-05 should be subject to the restraints of the United States Constitution.

If this Court should find that the Crow Nation has the power to regulate the hunting and fishing activities of non-members on their own lands, such regulations should not be allowed to violate individual rights of due process and equal protection of the law as guaranteed by the United States Constitution.

It is recognized that, as a general rule, the United States Constitution does not bind Indian tribes in regard to their internal affairs. This Court held in *Talton v. Mayes,* 163 U. S. 376, 384 (1896) that the fifth amendment did not "operat[e] upon . . . the powers of local self-government enjoyed by the [Indian] tribes." In explaining this conclusion, the Court stated, "[A]s the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which as we have said, has for its sole object to control the powers conferred by the Constitution on the national government."

The instant case presents a fact situation quite different from that of the *Talton* case. The ninth circuit based its decision upholding Tribal Resolution 74-05, as

modified, upon powers allegedly conferred on the Crow Nation by the Treaties of 1851 and 1868, as augmented by 18 U. S. C. § 1165. *United States v. Montana,* 604 F. 2d 1162, 1167 (9th Cir. 1979). These sources of tribal power did not "exist prior to the Constitution" but came long after Constitutional guarantees against arbitrary government action were firmly established. Nor does the resolution merely involve internal tribal affairs but permits the Crow Nation to regulate activities of non-members on their own lands.

Surely any power of an Indian tribe to regulate non-members, where the source of that power is the United States government through treaty provisions and/or federal statute, must be subject to the fundamental restraints of the Constitution. To hold otherwise would be to allow Congress to give to an Indian tribe the right to rule members and non-members arbitrarily—a right which Congress itself does not have. This conclusion is supported by another ninth circuit decision. *Settler v. Yakima Tribal Court,* 419 F. 2d 486, 489, *cert. denied,* 398 U. S. 903 (1969) wherein it was said:

> [A]lthough the Fourteenth Amendment may not apply to tribal courts, there must be and is a limit to the "exclusive" authority of the Yakima Nation to regulate Indian fishing when that regulation becomes so summary and arbitrary as to shock the conscience of the federal court, or goes beyond the scope of authority originally contemplated by the Treaty of 1859.

B. Tribal Resolution 74-05 is subject to the restraints of the Indian Civil Rights Act.

In the years following the *Talton* decision, concern developed over the lack of constitutional rights of individual

Indians *vis-a-vis* their tribal governments. In response to these concerns, Congress passed the Indian Civil Rights Act, 25 U. S. C. §§ 1301-1303 in 1968. In the case of *Santa Clara Pueblo v. Martinez,* 436 U. S. 49 (1978) this Court held that the Act did not authorize civil actions for injunctive or other relief to redress violations other than through the making of a writ of habeas corpus by a person detained by an Indian tribe. The *Santa Clara* holding does not bar the Court from addressing the due process and equal protection issues in this case, however, since all parties have asked the Court for a declaratory ruling on the legality of Tribal Resolution 74-05.

The legislative history of the Act suggests that Congress considered, and rejected, the opportunity to extend the full panoply of Constitutional restraints and requirements to tribal governments. Congress chose instead to retain those rights which it considered essential and to omit those rights which may have conflicted with traditional Indian cultures. *Martinez v. Santa Clara Pueblo,* 540 F. 2d 1039, 1044 (1976), *rev'd. on other grounds,* 436 U. S. 49 (1978).

Two rights which were explicitly retained in the Act are those of due process and equal protection of the laws. Section 1302 (8) of the Indian Civil Rights Act states: "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protecton of its laws or deprive any person of liberty or property without due process of law."

In the case of *Dry Creek Lodge, Inc. v. United States,* 515 F. 2d 926, 934 (10th Cir. 1975), the court held that this

section protected non-Indians as well as Indians, saying, "[i]t is indeed difficult to reach any other conclusion since by its terms it extends to all persons." *See, Schantz v. White Lightning,* 502 F. 2d 67, 70 n. 5 (8th Cir. 1974); *Hickey v. Crow Creek Hous. Auth.,* 379 F. Supp. 1002 (D. S. D. 1974); and *Dodge v. Nakai,* 298 F. Supp. 17 (D. Ariz. 1968). That position was also shared by Mr. Justice Rehnquist in his opinion in *Oliphant v. Suquamish Indian Tribe,* 435 U. S. 191, 195 (1978), where he observed:

> The Indian Civil Rights Act merely extends to "any person" within the tribe's jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal Constitution . . . an early version of the Indian Civil Rights Act extended its guarantees only to "American Indians," rather than to "any person." The purpose of the later modification was to extend the Act's guarantees to "all persons who may be subject to the jurisdiction of tribal governments, whether Indian or non-Indians." [Citation omitted.] . . . [T]he modification merely demonstrates Congress' desire to extend the Act's guarantees to non-Indians if and where they come under a tribe's criminal or civil jurisdiction by either treaty provision or act of Congress.

Thus, if it is found that the Crow Nation has the right by "either treaty provision or Act of Congress" to enforce its laws against non-Crow residents and land owners, such laws must be subject to the Indian Civil Rights Act.

It is respectfully urged that Crow Tribal Resolution 74-05 violates both the equal protection and due process clauses of the Indian Civil Rights Act, and thus cannot be allowed to stand, even as amended by the ninth circuit. 604 F. 2d at 1169. In appropriate circumstances courts have given due regard to the cultural and ethnical background

of the Indian tribes in litigation under the Act. *White Eagle v. One Feather,* 478 F. 2d 1311 (8th Cir. 1973); *Yellow Bird v. Oglala Sioux,* 380 F. Supp. 438 (D. S. D. 1974). In *Howlett v. Salish & Kootenai Tribes,* 529 F. 2d 233, 238 (9th Cir. 1976) the court, in articulating an approach designed to maintain cultural tribal identity and yet preserve fundamental constitutional rights, stated:

> Where the strict application of traditional equal protection doctrines would significantly impair a tribal practice or alter a custom firmly embedded in Indian culture, and where the individual injury alleged by the tribal member is, by comparison, not a grievous one, then the equal protection clause at 25 U. S. C. § 1302 (8) may be implemented somewhat differently than its constitutional counterpart.

It follows that where those special circumstances stated are not applicable, due process and equal protection rights, as interpreted under the Constitution, are embraced by the Indian Civil Rights Act. 540 F. 2d at 1045; 529 F. 2d 233 at 238; *Means v. Wilson,* 522 F. 2d 833 (8th Cir. 1973); *Crowe v. Eastern Bd. of Cherokee Indians, Inc.,* 506 F. 2d 1231 (4th Cir. 1974); *Johnson v. Lower Elwha Tribal Comm'n.,* 484 F. 2d 200 (9th Cir. 1973); 478 F. 2d at 1314; and *Hennessy v. Dimmler,* 394 N. Y. S. 786 (1977).

In the instant case, both the United States and the Crow Nation have stated that the right to hunt and fish within the confines of the reservation is a property right. This position is consistent with the holding of this Court in *Menominee Tribe v. United States,* 391 U. S. 404 at 413 (1968). This Court has also stated that the acquisition, enjoyment, and alienation of property are basic civil rights. *Jones v. Mayer Co.,* 392 U. S. 409, 432 (1968). In *Shelly*

v. Kraemer, 334 U. S. 1, 10 (1948) it was observed: "Equality in the enjoyment of property rights was regarded by the framers of that [14th] Amendment as an essential precondition to the realization of other basic civil rights and liberties. . . ."

It cannot be denied that Tribal Resolution 74-05 purports to take away the right of non-members to hunt and fish on their own property while members are not so proscribed. Therefore, the distinction drawn by the Crows is clearly between members and non-members of the Crow Nation. For the purposes of equal protection and due process analysis, the exact nature of this distinction is unclear. It is obviously a distinction based on an immutable characteristic; that is, whether one is or is not a Crow Indian. Therefore, it is most logically seen as a distinction based on race or national origin. Laws which discriminate on the basis of national origin or race receive strict scrutiny under the equal protection clause. *New Orleans v. Duke,* 427 U. S. 297 (1976); *Graham v. Richardson,* 403 U. S. 365 (1970); *Hunter v. Erickson,* 393 U. S. 385 (1969). This means that:

> In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.

In Re Griffiths, 413 U. S. 717, 721-722 (1973).

Neither the tribe nor the United States has suggested any compelling reason, or even a rational basis, why non-members should be prohibited from hunting on their own

land while members are presumably free to hunt on any land within the reservation—including that owned by the non-members! The goal purportedly is one of game conservation, certainly a legitimate tribal (and state) interest. But, in order to achieve that goal, no legitimate reason for making such a blatant distinction between the rights of Crows and non-Crows has been offered.

Due process analysis leads to the same conclusion. The case of *Jones v. Brim,* 165 U. S. 180, 182 (1897) held that the doctrine of substantive due process is meant to protect citizens from any arbitrary deprivation of rights, whether relating to one's life, liberty, or property. Due process demands that a law not be unreasonable, arbitrary, or capricious, and that the means selected has a real and substantial relation to a permissible legislative objective sought to be attained. *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 398 (1936).

The constitutional infirmity is not cured by the ninth circuit's modification whereby non-members would be allowed to hunt and fish on lands on which they actually reside. The distinction still lies between the Crows and non-Crows, because whether non-resident landowners would be allowed to hunt or fish on their own land would depend entirely upon whether or not such landowners were members of the Crow nation. Again, no sound basis for that distinction has been offered.

The ninth circuit's suggestion that "those who 'live on the land' in the West are likely to regard hunting and fishing thereon to be as natural and ordinary as working, sleeping, and eating" while "those who do not 'live on the

land' are somewhat less inclined" has no basis in either law or fact. 604 F. 2d at 1169. The right to use one's property has its legal foundation on the basis of ownership, not residency. Furthermore, many individuals purchase land in the west specifically for outdoor recreational purposes. All landowners, whether resident or not, regard the right to hunt and fish on their own land to be a property right to which they are entitled. The distinction between resident and non-resident non-members drawn by the ninth circuit can most accurately be seen as one of administrative convenience. Admittedly, it would be more difficult to enforce the proscription against residents than non-residents. This Court, however, has emphatically rejected administrative convenience as a rationale for discriminatory legislation. *See, Reed v. Reed,* 404 U. S. 71 (1971).

Finally, it should be noted that the ninth circuit cautioned Montana that it must not fashion its regulations so as "to discriminate against the Crow Tribe rather than to conserve the game and fish." 604 F. 2d at 1172. Surely non-discrimination must work both ways. Tribal Resolution 74-05 is patently discriminatory against non-Crows, and as such, it should not be upheld by this Court. Consequently, the ninth circuit decision must be reversed.

———o———

CONCLUSION

Under the Equal Footing Doctrine the beds and banks of navigable waters were held by the United States in trust for future states, save in exceptional circumstances where a contrary intention was clearly evidenced. A re-

view of the treaties and circumstances surrounding the establishment of the Crow Indian Reservation does not reveal any intention to deny the future State of Montana such ownership.

The Crow Indian Tribe has sought, through passage of a tribal resolution, to deny non-members the right to hunt and fish on lands owned by non-members within the reservation. The hunting and fishing prohibition applies only to non-members. The Crow tribal resolution is invalid because: (1) the tribe lacks inherent sovereignty over non-members and their lands; (2) the tribe did not obtain such power through treaties; and (3) the tribe did not obtain such power through statute. Further, Tribal Resolution 74-05, even as modified by the ninth circuit, is blatantly discriminatory against non-members.

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No. 79-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE STATE OF MONTANA, ET AL.,
Petitioners

v.

THE UNITED STATES OF AMERICA AND
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES ON THE MERITS

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BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES ON THE MERITS

The International Association of Fish and Wildlife Agencies, having obtained written consent of all parties to the case as required by Rule 36.2, submits this brief in support of petitioners.

INTEREST OF AMICUS

The International Association of Fish and Wildlife Agencies (hereinafter "the Association") is a voluntary, unincorporated association dedicated to coordinating the efforts of public administrative agencies responsible for the protection and management of the fish and wildlife of

North America. Founded at Yellowstone National Park in 1902, the Association numbers among its government members the fish and wildlife agencies of all fifty states.

The confusion by the Ninth Circuit of limited Indian sovereignty with general powers of government gives rise to the interest of the Association in this case. The Court of Appeals held that the Crow Tribe and the State of Montana exercise concurrent jurisdiction to regulate hunting and fishing by persons not members of the Crow Tribe on fee patented lands within the exterior boundaries of the Crow Reservation. While the power of the Crow Tribe, according to the court below, does not go so far as to permit an absolute proscription of hunting and fishing by nonmembers on lands owned by them, the Court of Appeals held that the Tribe does have power to regulate such hunting and fishing so long as "reasonable, nondiscriminatory, and consistent with sound principles of conservation." *United States* v. *State of Montana*, 604 F.2d 1162, 1172 (9th Cir. 1979).

The Association believes that the Court of Appeals erred in holding that the Crow Tribal Council may regulate hunting and fishing activities on fee patented lands. Interior holdings by nontribal members are extensive in western states. In the seven reservations located in Montana, interior holdings constitute large portions of the Blackfeet, Flathead, Fort Peck, and Crow reservations with lesser percentages in the Northern Cheyenne, Fort Belknap, and Rocky Boy reservations. In Idaho nearly ninety percent of the 756,000-acre Nez Perce Reservation is owned by nonmembers of the tribe and nearly eighty percent of the Coeur d' Alene Reservation of some 345,000 acres is owned by nonmembers. As to such lands, the Court of Appeals holds that an Indian tribe is empowered to proscribe actions by nonmembers which are authorized by the state. The Association believes that significant areas

of fee patented land other than those within the Crow Reservation are implicated by the holding below, that state jurisdiction over hunting and fishing on such lands is not concurrent but exclusive, and that the Court of Appeals erred in investing the Tribal Council with authority held by the State of Montana in this matter.

Amicus Association takes no position in this brief on the question of ownership of the bed and banks of the Big Horn River within the boundaries of the reservation.

SUMMARY OF ARGUMENT

1. Indian tribes possess limited sovereignty which arises from power over their territory and over their members. Indian tribes do not have sovereign power or authority respecting acts done by nonmembers on privately owned lands within a reservation unless Congress has specifically delegated such power. If treaty rights to hunt and fish are threatened with impairment by reason of acts of nonmembers occurring on fee patented lands within a reservation, the treaty right must be vindicated by application to the legislature or the courts.

2. The power to regulate is meaningful only when combined with the power to enforce. Congress has provided no sanction in the federal courts for hunting and fishing activities by nonmembers on fee patented lands within a reservation nor does the Court of Appeals give any indication as to how tribal regulation is to be enforced.

3. No allegation was made nor proof offered that hunting and fishing activities by nonmembers on fee lands were threatening to impair any treaty right. Without any finding of treaty right impairment, the Court of Appeals simply divested the state of a portion of its sovereign authority and vested it in the tribe. In so doing

the court performed an act which is essentially legislative in character and beyond its competence.

4. The power of the state over nonmembers on fee patent lands within a reservation is complete and perfect and the exercise of tribal power is not required to supplement ineffective state regulation. By contrast, tribal regulation of nonmembers on such interior holdings is ineffective because enforcement powers are denied the tribe.

ARGUMENT

The State of Montana Possesses Exclusive Authority To Regulate Hunting and Fishing by Non-Tribal Members on Fee Patented Lands Within the Crow Reservation. Any Impairment of Treaty Rights By Non-Tribal Members on Fee Patented Lands Must Be Vindicated by Application to the Legislature or the Courts and Not By Tribal Regulation.

In allocating jurisdictional responsibilities for regulation of hunting and fishing between the Crow Tribe and the State of Montana, the Court of Appeals concluded that the State's fish and game laws apply to nontribal members who obtain permission from the Tribe to hunt or fish within the limits of the reservation. The court was clearly correct in so holding.[1]

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[1] The following authorities hold that state hunting and fishing regulations are applicable to non-tribal members who hunt or fish within an Indian reservation. United States v. Sanford, 547 F.2d 1085 (9th Cir. 1976); White Mountain Apache Tribe v. Arizona, No. Civ. 77-867 (D. Ariz. June 13, 1978), appeal docketed, No. 78-3427 (9th Cir. November 8, 1978); Montana ex rel. Nepstad v. Danielson, 149 Mont. 438, 427 P.2d 689 (1967); Ex

(footnote continued)

The Court of Appeals held also that, as to fee patented lands, non-tribal-member resident owners or those whose occupancy is authorized, such as a tenant or an employee, may not be prohibited by the Tribe from hunting or fishing on the fee patented lands on which they reside but such activities may be regulated by the Tribe. Those who own fee patented lands but who do not reside thereon may, according to the Court of Appeals, be completely prohibited by the Tribe from hunting or fishing on their own land. Moreover, the freedom from absolute proscription enjoyed by the resident owner, his tenant or his employee, is an immunity which is held by the court to be lost if the individual attempts to hunt or fish on a tract other than the one on which he resides.

The precise rationale of the Court of Appeals for its allocation of jurisdiction between State and Tribe is not apparent but appears to be an amalgam of the following: (1) "the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described" accorded the Crow Tribe by Article 5 of the Treaty of 1851, a factor which, the court conceded, does not irrefutably establish the validity of tribal regulation; (2) the recognition by the court that the coverage of 18 U.S.C. § 1165 does not extend

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(footnote continues)

Parte Crosby, 38 Nev. 389, 149 Pac. 989 (1915); 78 I.D. 101 (1971); 1960-1962 Opinions of the Attorney General of Oregon, 11; 1953-1954 Opinions of the Attorney General of New Mexico, 511; 1950-1952 Opinions of the Attorney General of Nevada, 20. The 1971 Opinion of the Solicitor of the Department of the Interior, cited above, was withdrawn in 1974 but no reason was given for its withdrawal. Amicus Association is aware of two decisions which are *contra:* Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978), petition for writ of certiorari voluntarily dismissed, 48 U.S.L.W. 3786 (May 22, 1980); and Mescalero Apache Tribe v. State of New Mexico, Civ. No. 77-395M (D.N.M. August 2, 1978), appeal docketed, No. 78-1790 (10th Cir. September 29, 1978).

to fee patented lands, a factor which militates against the court's holding; (3) the further recognition by the court that the Allotment Acts anticipated substantial assimilation and that Congress could not have intended that fee patentees might hunt and fish only with tribal consent, another factor militating against the court's holding; and (4) the fact that a federal statute had once prohibited non-Indian hunting in Indian country except for subsistence purposes, an item of historical but less certain legal interest.

We agree with the Court of Appeals that the Tribe may withhold its permission from any individual who wishes to go upon land belonging to the Tribe or upon land held by the United States in trust for the Tribe for the purpose of hunting or fishing. We further agree that should the Tribe permit nonmembers to enter upon such lands for the purpose of hunting or fishing the Tribe may condition access by the charge of a trespass fee and may also establish conditions such as bag and creel limits. We agree also that nonmembers of the Tribe who hunt or fish within the exterior boundaries of the Crow Reservation are subject to state fish and game laws. However, we believe the Court of Appeals erred in determining that the Crow Tribe has regulatory authority over nonmembers on fee patented lands and to a demonstration thereof we now turn.

1. THE EXTENT OF TRIBAL JURISDICTION OVER NON-TRIBAL MEMBERS IS NOT CO-EXTENSIVE WITH THE NEED TO PRESERVE INDIAN TREATY RIGHTS. Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). Indian tribes possess those aspects of sovereignty not withdrawn by treaty or statute and not inconsistent with their dependent status. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). In upholding in major part the attempt by the

Tribe in Regulation 74-05 to regulate nonmember hunting and fishing on fee patented lands, the Court of Appeals finds support for its jurisdictional allocation scheme in the proposition that "modification of Indian treaty rights should be narrowly construed." *United States* v. *Montana*, 604 F.2d 1162, 1169 (9th Cir. 1979). The court below thus appears to say that because the treaty privilege respecting hunting and fishing might be impaired by nonmembers on fee patented land the Tribe has the right to regulate such individuals.

We are aware of no doctrine which measures the sovereign powers of an Indian tribe over nonmembers by the need to preserve treaty rights. Indeed, as this Court stated in *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978), "The areas in which implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." Indian tribes possess "attributes of sovereignty over both their members and their territory." 435 U.S. at 323. In the instant case, however, the Court of Appeals found attributes of sovereignty in the Crow Tribe over nonmembers for conduct occurring on lands neither owned by the tribe nor held in trust for their benefit. Amicus believes that limited Indian sovereignty simply does not extend to such subjects unless Congress has delegated authority to a tribe as in *United States* v. *Mazurie*, 419 U.S. 544, 558 (1975). The authority of an Indian tribe is based on the two elements of property and sovereignty over its members. When both elements are missing Indian authority simply does not exist.

The most that can be said of fee patented lands within the exterior boundaries of an Indian reservation is that, by their physical location, such lands may be implicated in the fulfillment of treaty rights. Nonmember owners and those residing on such former reservation lands may thus

be called upon to yield some part of the full measure of their property rights in order that the federal right be fulfilled. But, and this is a signally important condition not perceived by the Court of Appeals, fee patent owners may not be regulated by the Tribal Council or divested by it of rights enjoyed by other citizens of the state for that is manifestly beyond the reach of the tribe's limited sovereignty over its property and its members. If fee patent owners are to be deprived of hunting and fishing rights enjoyed by other citizens of the state it must occur by the action of a sovereign having powers of general government. The tribe, in other words, may not establish its own regulatory regime but must seek vindication of its treaty rights in the legislature or the courts. Thus, for example, federal courts have assumed jurisdiction over the question of what obligations the State of Washington owed to Indian tribes under the fishing rights provisions of treaties with the Northwest Tribes. The district court there specifically ordered state defendants to make reductions in non-Indian fishing so as to vindicate the treaty right of fishing at usual and accustomed places off the reservation. *United States* v. *Washington*, 384 F. Supp. 312, (W.D. Wash. 1974) *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). In the instant case, no allegation was made and no proof offered that treaty provisions relating to hunting and fishing were being impaired by nonmembers on fee patented lands within the reservation. The Court of Appeals, by investing the Tribe with jurisdiction over activities of non-tribal members on fee patent lands, simply left it to the Tribal Council to decide on the nature of the treaty right and that was improper.

2. CONGRESS DELIBERATELY CHOSE TO EXCLUDE FEE PATENTED LANDS FROM THE PROVISIONS OF THE FEDERAL TRESPASS STATUTE. Whereas "Indian country" is defined at 18 U.S.C. § 1151 to include fee patented lands within

the exterior boundaries of an Indian reservation, the federal trespass statute at 18 U.S.C. § 1165 excludes such lands. Legislative history discloses that the purpose of the enactment was to establish federal protection for land belonging to an Indian tribe or held by the United States in trust for the tribe because Indian tribal law was enforceable only against Indians.

"While non-Indians are subject to State laws when they go on Indian reservations, many of the States do not have criminal trespass laws and in other States the Indians find it most difficult to comply with the requirements of State laws designed to control trespass." H. Rep. No. 625, 86th Cong., 1st Sess. 2 (1959). Section 1165 ensured that trespassers onto Indian land would not be immune. For our purposes, however, it is of more than passing interest that the bill as originally proposed by the House Committee on the Judiciary used the words "Indian country" as the territory subject to the trespass statute. In a letter to the Committee dated May 23, 1958, the Assistant Secretary of the Interior recommended the present language of section 1165 because it was "more precise." H. Rep. No. 2593, 85th Cong., 2d Sess. 3-5 (1958). The Committee deliberately adopted the present language which includes only lands held or controlled by Indians or the United States. The exclusion of fee patented land is established both by reference to the statute and by reference to its legislative history.

Moreover, the reason for use by Congress of the broader term "Indian country" in 18 U.S.C. § 1151 related to the purpose of the Major Crimes Act. Congress was clear that where an Indian committed an offense against a white man or vice versa in Indian country federal jurisdiction should be exclusive. Fee patented lands were included because, if the existence *vel non* of federal jurisdiction were to depend upon the ownership of particular parcels of land, law enforcement officers would

find it necessary to search tract books in order to determine whether criminal jurisdiction over the offense, even though it be committed within the reservation, is in the state or the federal government. See *Seymour* v. *Superintendent*, 368 U.S. 351, 358 (1962). Such an impractical pattern of checkerboard jurisdiction was avoided by section 1151. Section 1165, by contrast, did not pose the same problem because jurisdiction of the state over non-Indians for fish and game violations within the boundaries of a reservation had long been recognized.

3. THE COURT OF APPEALS ASCRIBED TO THE TRIBE A RIGHT TO REGULATE, BUT THE POWER TO ENFORCE ITS REGULATIONS IS NOT APPARENT. Nowhere in its opinion does the Court of Appeals suggest how tribal regulations affecting hunting and fishing activities by nonmembers on fee patented land will be enforced. As the Ninth Circuit has stated in a related context, "The power to regulate is only meaningful when combined with the power to enforce." *Settler* v. *Lameer*, 507 F.2d 231, 238 (9th Cir. 1974). The term "jurisdiction" means the power to regulate, i.e., the authority to enforce regulation against unwilling persons through coercive instruments of government. See *Wedding* v. *Meyler*, 192 U.S. 573, 584 (1904). How will the Tribe's absolute proscriptions and regulation which is less than absolute proscription be enforced?

Non-tribal members may not be tried on criminal charges in tribal courts. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). Additionally, 18 U.S.C. § 1165 does not apply to entry on to fee patented land for the purpose of hunting or fishing.[2] If the Court of Appeals means to suggest that tribal agents may enforce tribal regulations on fee patented land, then the source of that

[2] See United States v. Bouchard, 464 F. Supp. 1316, 1338 (W.D. Wisc. 1978); United States v. Pollman, 364 F. Supp. 995 (D. Mont. 1973).

authority is not apparent. Such authority certainly does not spring from "inherent powers of limited sovereignty." Nor is 18 U.S.C. § 1165 available to enforce tribal regulation on fee patented land. As Judge Jameson stated in *United States* v. *Pollman*, "It is 18 U.S.C. § 1165 rather than the ordinance of the Confederated Tribes which defines criminal conduct." 364 F. Supp. at 1002. While legal fictions have their uses, it would be an intolerable fiction to charge criminal trespass against an individual for activity on land which he himself owned.[3]

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[3] The practical and conceptual difficulties raised by the court's holding go beyond the question of enforcement of tribal regulation. If the tribe has power to regulate hunting and fishing by non-tribal members on fee lands why does it not have power to proscribe such activities completely? The tribe has such power over members and if the tribal power is linked to preservation of the treaty privilege to hunt and fish, then one would expect the power to be commensurate with preservation of the privilege. If the tribal power stems instead from the treaty right to occupancy of the lands within the exterior boundaries of the reservation, there can be no doubt that an event has occurred—the issuance by the United States of fee patents—which is inconsistent with "the absolute and undisturbed use and occupancy of the Indians." If non-resident owners occupy a lower status than resident owners, may the tribe establish residency requirements for the absentee owner who wishes to return and become immune from absolute proscription by the tribal council? If tribal regulation of hunting and fishing by non-members of the tribe on fee lands must be "reasonable, nondiscriminatory, and consistent with sound principles of conservation," 604 F.2d at 1172, how is the question of discrimination to be resolved? If fee patent owners are to be compared with tribal members in determining whether discrimination exists, then the tribal member who possesses through the tribe a treaty "privilege" to hunt and fish may consider the comparison disadvantageous. If fee patent owners are to be compared with the treatment accorded by the tribe to other fee patent owners, then the nondiscrimination requirement might well prove anemic.

Were this a case where the state had abdicated its responsibility for protection and management of wildlife or had fashioned its seasons and bag limits so as to threaten to impair treaty rights the exercise of judicial powers might be warranted.[4] But even so it would be a matter for judicial determination. In the Northwest Treaty tribes case an issue before Judge Boldt was whether a tribe had authority to enforce its off-reservation fishing regulations against persons not members of the tribe. Answering in the negative the court stated:

> A self-regulating tribe has authority only over its own members. However, the tribes should report apparent misuse of the fishery to the state

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[4] No such proof was offered and any such proffer would likely be unavailing. Montana has taken an aggressive stance to preserve fish and wildlife found within the state. Article IX, Section 1(3) of the 1972 Constitution of Montana states: "The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." A number of important legislative actions have been taken in this spirit. In 1963 the Montana legislature enacted the Stream Preservation Act, Mont. Rev. Codes Ann. §26-1501 *et seq.* (1947), the first state law of its kind. Policy of the Act is stated as follows: "It is hereby declared to be the policy of the State of Montana that its fish and wildlife resources and particularly the fishing waters within the state are to be protected and preserved to the end that they be available for all time, without change, in their natural existing state except as may be necessary and appropriate after due consideration of all factors involved." §26-1501. This enactment was followed by the Environmental Policy Act of 1971, Mont. Rev. Codes Ann. §69-6501 *et seq.* (1947), the Utility Siting Act of 1973, Mont. Rev. Codes Ann. §70-801 *et seq.* (1947) and the Montana Strip Mining and Reclamation Act of 1974, Mont. Rev. Codes Ann. §50-1034 *et seq.* (1947). These statutes regulate economic development within the state.

> if a non-Indian is involved or to the tribe of a treaty right fisherman, and if appropriate action is not taken, such report should be brought to the court for such action as the court finds appropriate.

United States v. *Washington*, 384 F. Supp. 312, 410-411 (W.D. Wash. 1974). In the instant case, without the triggering effect of a finding of treaty right impairment, the Court of Appeals simply vested the Crow Tribe with regulatory jurisdiction. In so doing it took upon itself the exercise of an act whch is "essentially legislative in character." Cf. *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342, 365-366 (1949). Even the language used by the Court of Appeals is the language of accommodation familiar to the legislature.[5] Congress might have delegated to the Crow Tribe the power to regular nonmember hunting and fishing on fee patent lands, *United States* v. *Mazurie*, 419 U.S. 544 (1975), or Congress might have broadened 18 U.S.C. § 1165 to cover unauthorized hunting or fishing on fee patent lands. Congress, however, did neither.

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[5] "[O]ur task is to keep faith with the Indian while effectively acknowledging that Indians and non-Indians alike are members of our Nation. Both seek power and gain through identical processes, viz. commerce, politics, and litigation. We must, however, live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians." 604 F. 2d at 1169. Were this passage simply the peroration at the end of a rigorous legal analysis it would be unexceptional. However, the passage is not a peroration but instead marks one of the few passages in the court's opinion on this issue which possesses any explanatory power. Even the Solicitor General characterizes the court's action as a "modest accommodation of interests." Brief for the United States in Opposition to Petition for Writ of Certiorari, p. 14.

4. THE STATE POSSESSES "COMPLETE AND PERFECT" JURISDICTION OVER NON-INDIANS ON FEE PATENT LANDS, AND TRIBAL POWER IS NOT ESSENTIAL TO SUPPLEMENT INEFFECTIVE STATE REGULATION. Enforcement powers are not denied the state as was the case in *Settler* v. *Lameer*, 507 F.2d 231 (9th Cir. 1974), which involved power of the state to regulate Indian off-reservation fishing. Indeed the situation here is the reverse of that in *Settler* for here the enforcement powers are available to the state but not to the tribe. All incidents of ownership of the fee patented land are subject to determination by applicable state law, *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), and Montana law governs with respect to property rights. *Dillon* v. *Antler Land Co.*, 507 F.2d 940, 942 (9th Cir. 1974). Issuance of a fee patent freed the United States from its duties and obligations to the Indians with respect to the lands it theretofore held in trust and defined a new status of those Indians in their relation to the state. *Id.* at 944. Application of state law to the fee patent land is required by statute. 25 U.S.C. § 349. State authority is thus "perfect and complete" while the tribal authority found by the Court of Appeals is based neither on proprietary interest of the tribe or of the United States, on powers of enforcement delegated by Congress to the tribe, or on powers of enforcement delegated to United States Attorneys.

CONCLUSION

For all the reasons set forth above, Amicus Association believes the decision of the court below should be reversed insofar as it holds that the Crow Tribal Council has authority to regulate hunting and fishing by non-tribal members on fee patented land within the Crow Reservation.

Respectfully submitted,

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October Term, 1979

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Respondents,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE STATE OF MINNESOTA and MINNESOTA COUNTIES OF BECKER, BELTRAMI, CASS, CLEARWATER, KOOCHICHING, LAKE OF THE WOODS, MAHNOMEN and PENNINGTON

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INTEREST OF AMICI CURIAE

The State of Minnesota and Minnesota Counties (hereafter "State" and "Counties") have a particular interest in the issue presented in this case of whether an Indian tribe has the exclusive authority to proscribe or regulate hunting and fishing by non-Indians on non-Indian owned fee land within an "open" reservation. The interest goes beyond the fact that there are eleven Indian reservations currently recognized by the Department of Interior within Minnesota, encompassing over two million acres of land. The State and three of the Counties (Becker, Clearwater and Mahnomen) are at present the defendants in a lawsuit[1] in which the White Earth Band of Chippewa Indians is seeking exclusive hunting and fishing jurisdiction over all lands within the 1867 White Earth Reservation, an area which is now over 90% non-Indian owned and in which non-Indians outnumber Indians by over two to one. The other *amici* Counties are either on or near other Indian reservations within the state which may be influenced by the results of the present appeal.

The results in *United States v. Montana* will obviously have substantial impact not only on the pending litigation in Minnesota but also on anticipated future litigation. Therefore the State and Counties wish to participate in a limited fashion here and make some of their views known at this time. Also, to the extent the history and treaties of Minnesota's reservations differ from those of Montana, the State and Counties wish to emphasize that a detailed case by case analysis of the facts and history of each affected reservation is required when courts are analyzing congressional intent and jurisdictional disputes between States and Indian Reservations. *See, e.g.,*

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[1] *White Earth Band of Chippewa Indians v. Robert L. Herbst, et al.*, Civ. No. 3-74-63 (D. Minn.).

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); *De Coteau v. District County Court*, 420 U.S. 425 (1975).

SUMMARY OF ARGUMENT

The court below held that the Crow Tribe could proscribe or regulate all hunting and fishing by all non-resident non-members anywhere within the reservation. The court also held that resident non-members could not be prohibited from hunting and fishing on their own land, but that such activities were still subject to tribal regulation.

The court below found authority for such tribal regulation generally in two ways. The court first cited the Treaty of 1868 (15 Stat. 649). The 1868 treaty preserved territory for the absolute use and occupation of the Crow Indians and ostensibly barred anyone without authority from entering the reservation.[2] The court found that the authority to exclude non-Indians from reservation lands included the authority to regulate the hunting and fishing activities of non-Indians on non-Indian lands. The second rationale apparently used by the court below was the notion that the Tribe had inherent sovereignty which gave it the authority to regulate non-members who enter the reservation to hunt and fish. The Respondent Crow Tribe asserted a third rational which the court below did not address specifically. The Tribe argued that since its right to hunt and fish was termed "exclusive," it follows that the Tribe has the sole authority to license that right to all people on all lands within the reservation. *See* Brief for the Crow Tribe in Opposition to Petition for Writ of Certiorari at 14.

It is the position of the State and Counties that none of these asserted authorities allows the Crow Tribe or other similarly

[2] 604 F.2d at 1166-1167.

situated tribes to proscribe or regulate hunting or fishing by non-Indians on non-Indian lands within reservation boundaries. Specifically, it is the position of the *amici* State and Counties that: (1) the Crow Indian Tribe does not have the inherent authority to regulate non-Indian activity on non-Indian owned lands within the reservation because such authority was relinquished as a result of the tribe's dependent status; (2) a close analysis of relevant authorities reveals that any generally recognized tribal power to exclude extends only to Indian-owned lands within a reservation and that in the instant case Article 2 of the pertinent treaty (Treaty of May 7, 1868, 15 Stat. 649) is not, because of the rationale of *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 174 (1977), satisfactory authority for the regulatory power recognized by the court below; and (3) the "exclusive right" claimed by the Crow Tribe is also not, because of the rationale of *Puyallup Tribe, Inc.*, satsifactory authority for the ruling of the court below. Finally, it is the position of the *amici* that, even assuming a tribe otherwise retained the authority to regulate non-Indian hunting and fishing, an examination of the purposes and policies underlying the enactment of the 1887 General Allotment Act (24 Stat. 388) and other special allotment acts including the 1920 Crow Allotment Act (41 Stat. 751) makes it clear that Congress did not intend non-Indians coming on a reservation to be subject to tribal regulation on non-Indian owned land. It is important to recognize that the State and Counties do not contest the proposition that the Crow Tribe may prohibit or regulate hunting and fishing by non-Indians on *Indian-owned* lands within the reservation.

ARGUMENT

I. THERE IS NO INHERENT TRIBAL AUTHORITY TO REGULATE HUNTING AND FISHING BY NON-INDIANS ON NON-INDIAN LAND.

The court below apparently based its decision at least partially on a perceived "inherent authority" on the part of the Crow Tribe to regulate hunting and fishing by non-Indians on non-Indian land. This view conflicts with the recent decisions of this Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978), and does not find support in the "tradition of sovereignty" of the Crow Tribe. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. 4668, 4679-4682 (1980) (Rehnquist, J. concurring and dissenting).

In Oliphant, of course, this Court found that Indian tribes do not have criminal jurisdiction over non-Indians absent an affirmative delegation of such power by Congress. 435 U.S. at 208. As the Court in that case recognized, "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers 'inconsistent with their status' . . ." *Id.* (citation omitted) (emphasis in original). In *Wheeler*, the Court further explained that the incorporation of the Indian tribes "within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." 435 U.S. at 323. Thus, the Court stated that the tribes retained only those aspects of sovereignty "not withdrawn by Treaty or Statute, or by implication as a necessary result of their dependent status." 435 U.S. at 323.

This Court determined in *Oliphant* that as a result of their dependent status, tribes necessarily gave up their right to exercise criminal jurisdiction over non-Indians. 435 U.S. at 208-11. Similarly here, Indian tribes as a result of their dependent status relinquished the right to exercise civil jurisdiction over non-Indians who hunt and fish within the reservation—at least on land no longer in Indian ownership—absent some sort of an affirmative delegation from Congress. As was pointed out in *United States v. Wheeler*,

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe *and nonmembers of the tribe*. . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to *determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. *They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a Tribe's dependent status.*

135 U.S. at 326 (emphasis added). Significantly, it appears that the shared assumption among the executive and legislative branches of the federal government, at least with regard to tribal regulation of non-Indian hunting and fishing, was that Indian tribes do not have the inherent authority to so regulate. *See e.g.* H. R. Rep. No. 625, 86 Cong., 1st Sess. (1959), at 2, 4 (letter of the Asst. Secy. of the interior); S. Rep. No. 1686, 86 Congress, 2d Sess, (1960) at 2, 4 (letter of the Asst. Secy. of the Interior). This "shared assumption" is further demonstrated by the fact that it was consistently

recognized by the judicial and executive branches that tribes do not have the inherent authority to exercise civil jurisdiction over non-Indian non-members absent their consent. *Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1388, 1342 (D.S.D. 1975); 7 Op. Atty. Gen. 174 (1855); II *Opinions of the Solicitor of the Department of the Interior* at 1742 (Memorandum of Solicitor, dated July 26, 1956); *Powers of Indian Tribes*, 55 I.D. 14, 56-64 (1934). *See also Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen*, Civ. No. 2343, Memorandum Decision at 44-50 (D. Montana, September 19, 1979); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 77-882M, Order at 6-7 (W.D. Wash. July 27, 1978). *See generally* Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 55 Wash. L. Rev. 479, 513 & 515 (1979).

This analysis is supported by the fact that the exercise of tribal sovereignty in this instance would be inconsistent with the overriding interests of the National Government, recognized in *Oliphant*, 435 U.S. at 210, that U. S. citizens be protected from unwarranted intrusions on their personal liberty. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. at 4673. Although not as dramatic as in the area of criminal law enforcement, civil regulatory enforcement may nevertheless involve such intrusions. Therefore, as with criminal jurisdiction, the tribes by submitting to the overriding sovereignty of the U. S. gave up the general power to exercise jurisdiction over hunting and fishing by non-Indians since, as pointed out in *Oliphant*, 435 U.S. at 210, "Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.'" (Citation omitted.) Moreover, because the lands involved are not Indian owned, this is not an area in which a tribe traditionally has a signifi-

cant interest. *See Washington v. Confederated Tribes of the Colville Reservation*, 48 U.S.L.W. at 4673.

The import of the foregoing is clear. Because the regulatory authority advocated for the tribes here involves non-Indian activity on non-Indian owned lands, this power pertains to the tribe's external relations and has therefore been lost as a necessary result of the tribe's dependent status.

Further, the State and Counties recommend that the "inherent authority" of the Crow Tribe be analyzed in a manner similar to that set forth by Mr. Justice Rehnquist in *Washington v. Confederated Tribes of the Colville Reservation*, 48 U.S.L.W. 4668 (1980). Such an approach entails examining the "tradition of sovereignty" with regard to the tribal regulation of non-Indians on non-Indian lands. The tradition, the State and Counties believe, on the Crow Reservation and elsewhere will indicate that the tribal regulation of non-Indians on non-Indian land has not been historically accepted or exercised.[3] After the "tradition" has been examined, it will be appropriate to review relevant treaties and statutes to determine whether Congress expressly altered that tradition. If Congress did not so alter the traditional concepts, and *amici* believe that there is nothing in the Crow situation to indicate that Congress did, then the Court should not grant the tribe civil jurisdiction over hunting and fishing by non-Indians on non-Indian land.

In any event, the ambiguous rationale of the court below should not be accepted. More than anything else the opinion

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[3] To the contrary, the district court found in the present case that the State of Montana has regularly exercised its jurisdiction over non-Indians hunting and fishing on non-Indian land, and that the preponderance of evidence supported a conclusion that the Tribe did not regularly exercise any jurisdiction over non-Indians. 457 F. Supp. 599, 609-610.

below reflects a philosophy that the court should in effect legislate what it considers to be a "reasonable" solution when, in the court's words, "legislative or executive solutions are unlikely to be offered within the reasonable foreseeable future." 604 F.2d at 1172. The difficulty with such an approach (*i.e.* not using a definite and consistent legal framework for analysis) is that there is no consistency to legal results. Different courts will have different "feelings" about what is a reasonable legislative solution to a particular problem. The court below simply tried to legislate Indian policy. Its attempts may have been motivated by high ideals, but its approach was not in accord with the principles which prevail in the field of Indian law. As was pointed out by this Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615, "our task here is a narrow one . . . [W]e cannot remake history."

In conclusion, the court below erred in finding tribal regulatory authority in this case by ambiguous references to Indian sovereignty or inherent rights. The analyses set forth in *Oliphant, Wheeler,* and *Washington v. Confederated Tribes* are the correct ones which should determine the result here, a result which should be different than that reached by the court below.

II. THE COURT-CITED AUTHORITY TO EXCLUDE NON-INDIANS FROM RESERVATION LAND DOES NOT EXTEND TO NON-INDIAN OWNED LANDS.

Although tribes may no longer have the inherent authority to regulate non-Indian activity, there may nevertheless be other rights retained by Indian tribes which empower them to prohibit or regulate hunting and fishing by non-Indians on non-Indian owned lands within existing reservations. The

court below apparently based its holding at least in part on the Crow Tribe's power to exclude non-Indians from entering the reservation. *See e.g.*, Brief for the Crow Tribe in Opposition at 15. A close examination of the relevant authorities, however, reveals that any power to exclude non-Indians extends only to Indian-owned lands within the reservation, unless there is a treaty provision of federal law which expands that power.

It is pointed out in the Department of Interior publication *Federal Indian Law* (G.P.O. 1958) at 438 that the law respecting the power of tribes to exclude non-members from their reservations "is clearly stated in a series of authorities running back to the earliest days of the Republic. . . ." *See, e.g.*, 1 Op. Atty. Gen. 465 (1821); 18 Op. Atty. Gen. 34 (1886). *See also Worcester v. Georgia*, 6 Pet. 515, 561 (1833); *Maxey v. Wright*, 3 Ind. T. 243, 58 S.W. 807, 809 (1900), *aff'd* 105 F. 1003 (8th Cir. 1900). What is significant about these early authorities is that the power to exclude is linked to the occupancy or possession of the lands by the Indian tribe. Thus, as early as 1821, the United States Attorney General recognized that "[s]o long as a tribe exists and *remains in possession of its lands, its title and possession* are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent. . . ." 1 Op. Atty. Gen. at 466 (emphasis added). These principles were again stated by the Attorney General in an opinion issued in 1884. *See* 18 Op. Atty. Gen. at 36-37. *See also Maxey v. Wright, supra*, in which this 1884 Attorney General's opinion is quoted favorably. Thus, it is apparent that the common theme among the earlier authorities respecting the power to exclude was that that power was based upon or derived from the Tribe's right of possession or occupancy.

Some later authorities, however, take a more extreme position that Indian tribes have the inherent authority to exclude non-members not only from Indian-owned lands but from non-Indian-owned lands as well; that is, from lands in which neither the tribe nor its members have the right of occupancy or possession. *See, e.g., Federal Indian Law, supra* at 439. The primary authority for this view is the Solicitor's Opinion of October 25, 1934, entitled "Powers of Indian Tribes" (55 I.D. 14, 50), and the cases cited therein. A review of the authorities upon which that opinion is based, however, reveals that this view is erroneous. The cases relied upon in the 1934 Solicitor's Opinion are *Buster v. Wright*, 135 F. 947 (8th Cir. 1905); *Morris v. Hitchcock*, 21 App. D.C. 565 (1903), *aff'd*, 194 U.S. 384 (1904); and *Maxey v. Wright, supra.*[4] Of particular significance is the fact that each of those cases involved questions respecting the inter-relationship of the treaty powers of the Five Civilized Tribes to tax or license non-members and to remove those who would refuse to pay the license or tax. *Buster v. Wright*, 135 F. at 949; *Morris v. Hitchcock*, 21 App. D.C. at 568-70; *Maxey v. Wright*, 58 S.W. at 808. These cases therefore did not turn upon the inherent authority of the Indian tribes involved to exclude non-members but instead upon the unique and expansive provisions contained in the treaties made with the Five Civilized Tribes.[5] *See Morris v. Hitchcock*, 194 U.S. at 389-

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[4] As indicated *supra, Maxey v. Wright* is, in fact, supportive of the position taken by the *amici* here.

[5] As was recognized in an Opinion of the Attorney General dated September 17, 1900

> Under the treaties with the Five Civilized Tribes of Indians no person not a citizen or member of a tribe, or belonging to the exempted classes, can be lawfully within the limits of the county occupied by these tribes without their permission, and they have the right to impose the terms upon which such permission will be granted.

Quoted in *Morris v. Hitchcock*, 194 U.S. at 391. *Accord* 23 Op. Atty. Gen. 214, 216 (1900).

91; *Buster v. Wright*, 135 F. at 951; *Maxey v. Wright*, 58 S.W. at 809-10. *See also* 23 Op. Atty. Gen. 528 (1901); 23 Op. Atty. Gen. 214 (1900); 17 Op. Atty. Gen. 134 (1881).

As the foregoing discussion indicates, any inherent authority on the part of a tribe to exclude non-Indians extends only to Indian-owned lands unless there is a provision in a treaty or federal law expanding that authority.[6] In the present case, then, the Crow Tribe has authority to exclude non-Indians only on Indian-owned land[7] unless a provision in a treaty of federal law can be found which expands the Tribe's authority to non-Indian owned land. Thus, with regard to the present case, the question to be resolved is whether there is a treaty provision or federal law which grants the respondent Tribe the power to exclude non-members from non-Indian owned lands within the reservation.

The court below cited Article II of the Treaty of 1868 (15 Stat. 649) as a treaty provision which expanded the Tribe's inherent authority. That Article, in relevant part, provides that

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[6] In more recent cases in which the power to exclude is integral to the decision of the court, Indian owned lands were directly involved (*Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 554 (8th Cir. 1958); *Iron Crow v. Ogalalla Sioux Tribe of the Pine Ridge Reservation*, 129 F. Supp. 15, 24-25 (D.S.D. 1955), *aff'd*, 231 F.2d 89 (1956)), or the reservation involved was a "closed" reservation. *Compare Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976) (Fort Yuma Reservation); *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975) (Papago Indian Reservation); *Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1969) (Navajo Reservation) *with* U. S. Department of Commerce, *Federal and State Indian Reservations and Indian Trust Areas* at 63 (Navajo Reservation), 66 (Papago Reservation) and 108 (Fort Yuma Reservation) (G.P.O. 1974).

[7] Therefore, the authority to regulate hunting and fishing by non-Indians, based on the right to exclude, would only extend to Indian-owned land.

> the United States now solemnly agrees that no persons, except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians. . . .

Reliance upon this provision for the Tribe's power to prohibit non-Indians from hunting upon non-Indian owned lands is misplaced.

The provisions cited by the court below obligated the United States to prohibit certain classes of people from residing or passing upon the reservation.[8] The subsequent history of the Crow Reservation indicates that this provision has been abrogated by Congress. Congress made inevitable that result when it opened up lands on the reservation for sale to non-Indians, and when it authorized the alienation of allotted lands, with the resulting establishment of predominantly non-Indian communities and construction of roads and highways on the non-Indian land. All of these events were clearly foreseeable and in fact actually contemplated by Congress when it embarked on the allotment approach to "civilizing" Indian tribes. In using this approach on the Crow Reservation, Congress determined that for all practical purposes the obligation the United States had undertaken under Article II of the Treaty of 1868 was to be nullified, at least with regard to land made available for non-Indian settlement. This result is consistent with the result in *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 174 (1977), where it was determined that the provisions of a treaty (10 Stat. 1132) granting "exclusive

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[8] Similar provisions are contained in a number of treaties made with other tribes. *See e.g.*, Treaty of October 14, 1864 (16 Stat. 707, Art. I); Treaty of June 9, 1855 (12 Stat. 951, Art. II); Treaty of July 3, 1868 (15 Stat. 673, Art. II); Treaty of January 22, 1855 (12 Stat. 927, Art. II); Treaty of April 29, 1868 (15 Stat. 635, Art. II).

use" and guaranteeing that no white men would be permitted to reside on the reservation were implicitly abrogated when most of the Indian lands of the reservation were subsequently alienated to non-Indians pursuant to congressional action.

In conclusion, neither the inherent power of Indian tribes to exclude non-members nor the treaty obligations assumed by the United States in Article II of the Treaty of 1868 are satisfactory authority for the power of the Tribe to prohibit or regulate hunting and fishing by non-Indians on non-Indian owned land within the reservation.

III. THE TRIBE'S CLAIM OF EXCLUSIVE HUNTING AND FISHING RIGHTS IN ALL PRESENT RESERVATION LANDS IS NOT VALID.

Although not relied upon by the court below, the Respondent tribe asserts that its claims in this case are "legally correct . . . because the Tribe's hunting and fishing rights are exclusive, and the Tribe has sole power to license them . . . ." Brief for the Crow Tribe in Opposition to Petition for Certiorari at 14. This argument is also incorrect. The Treaty of 1868 does not specifically grant the Crow Tribe the exclusive right to hunt and fish on the reservation created by it. It does, however, provide that the reservation was to be set aside for the Indians' "absolute and undisturbed use and occupation." Art. II, 15 Stat. 650. Even assuming that this provision is sufficient to create exclusive hunting and fishing rights, since lands within the reservation have pursuant to congressional enactment passed out of Indian ownership, the Tribe's rights to hunt and fish can no longer be considered to be "exclusive" in regard to those lands. *See Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. at 174-76.

In *Puyallup Tribe, Inc.*, this Court, when confronted with a treaty provision similar to that involved here regarding "exclusive" use, found that because tribal lands had been alienated pursuant to congressional enactment "[n]either the Tribe nor its members continue to hold Puyallup River fishing grounds for their exclusive use. . . ." *Id.* at 174. The significance of *Puyallup Tribe, Inc.* with regard to the present case is that it unmistakably established that "exclusive" rights created by treaty—the basis asserted by the Tribe here—are effectively extinguished with the alienation of the lands to non-Indians. Therefore, there is no "exclusive" right existent under the 1868 Treaty which would authorize the Crow Tribe to prohibit or regulate hunting and fishing by non-Indians on non-Indian owned land.

IV. THE GENERAL ALLOTMENT ACT ABROGATED ANY AUTHORITY WHICH THE CROW TRIBE ORIGINALLY MIGHT HAVE HAD TO REGULATE HUNTING AND FISHING BY NON-INDIANS ON NON-INDIAN LAND.

The foregoing discussion demonstrates that the Crow Tribe is without authority to prohibit or regulate non-Indian hunting and fishing on non-Indian owned lands within the reservation. However, even assuming that the sources relied upon by the court below are a sufficient basis for such regulation, that authority was effectively abrogated by Congress when it enacted the 1887 General Allotment Act (24 Stat. 388) and other special allotment acts pursuant to the policy underlying the General Allotment Act.

The court below found that in enacting the General Allotment Act and the 1920 Crow Allotment Act (41 Stat. 751),

Congress intended only to qualify the Tribe's right to prohibit hunting and fishing on the reservation by resident non-Indians (although the court still held that such activities by non-Indian residents could be regulated by the Tribe). This narrow view of the intent of the General Allotment Act view is in error. A detailed analysis of the policy underlying the enactment of that legislation[9] reveals that the approach taken by the court below is overly restrictive.

As the court below recognized, "[s]ubstantial assimilation" was a goal of the General Allotment Act and the 1920 Crow Allotment Act. 604 F.2d at 1168. The policy of the federal government which was to be implemented by the operation of the General Allotment Act was the civilization of the Indian population. This policy was to be carried out primarily by education, allotment to Indians of lands in severalty, and the eventual destruction of tribal relations.[10] As pointed out in *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976), "[t]he idea [underlying the General Allot-

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[9] The 1920 Crow Allotment Act was one of the special allotment acts Congress passed from time to time in pursuance of the general policy underlying the General Allotment Act. *See* S. Rep. No. 219, 66th Cong., 1st Sess. at 5 (1919). Thus, in the Senate report on the Crow Allotment bill, it was stated, in relevant part, as follows: "It [the Crow Allotment bill] is in accordance with the policy to which Congress gave its adherence many years ago, and which found expression in the Dawes Act [General Allotment Act]". *Id.* at 5. In addition, a significant amount of acreage within the reservation was alloted to tribal members prior to enactment of the 1920 Crow Allotment Act directly pursuant to the General Allotment Act. *See* Department of the Interior—Office of Indian Affairs, *General Data Concerning Indian Reservations*, Table 4 at 6-7 (1929).

[10] *See, e.g.*, Report of the Secretary of the Interior (1885), pp. 25-28; Report of the Secretary of the Interior (1886), p. 4; Report of the Commissioner of Indian Affairs (1887), pp. IV-X; Report of the Secretary of the Interior (1888), pp. XXIX-XXXII; Report of the Commissioner of Indian Affairs (1889), pp. 3-4; Report of the Commissioner of Indian Affairs (1890), pp. VI, XXXIX; Report of the Commissioner of Indian Affairs (1891), pp. 3-9, 26; Report of the Commissioner of Indian Affairs (1892), p. 5; Report of the Secretary of the Interior (1894), p. IV.

ment Act] was to 'civilize' the Indian by forcing him to abandon tribal life and take up the ways of the white farmers. . . ." *Id.* at 694. As will be discussed in greater detail *infra*, in light of the general purposes underlying the General Allotment Act and the means chosen by Congress to effectuate those ends, it seems evident that Congress did not intend that non-Indians who settled upon surplus lands or alienated allotted lands would be subject to the regulatory authority of the tribe on those lands.

As early as 1880, bills were introduced in Congress which provided generally for the allotment of reservation lands to Indians.[11] In 1881 a bill substantially similar to the General Allotment Act (S. 1773) was debated extensively in the Senate.[12] From the outset of and throughout the debates respecting the 1881 bill, it was clearly understood by all the members of the Senate that the purpose of the bill was to civilize the Indian population of the country and this was to be accomplished in part by the dissolution of tribal relations.[13] For example, Senator Saunders stated early in the debates on S. 1173 as follows:

> Heretofore we have recognized the tribal relations. . . . But now a new order of things is about to be established, as I understand. The people of this country are in favor largely, in my opinion, of giving the Indians the rights of citizenship, of making them citizens, and requiring of them all that is required of others . . . .
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[11] *See* H. R. 5038, 46 Cong., 2nd Sess. (1880); S. 1773, 46th Cong., 3d Sess. (1880).

[12] *See United States v. Mitchell*, —— U.S. ——, 100 S.Ct. 1349, 1354, n. 4 (1980).

[13] *See e.g.*, XI Cong. Rec. 779 (Sen. Vest), 782 (Sen. Coke), 783-84 (Sen. Saunders), 785 (Senators Morgan and Hoar), 881 (Sen. Brown), 906 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064 and 1065 (Sen. Plumb), 1067 (Sen. Williams).

> I only wanted to say that I favor the principle of the bill, that I wish it to be known that I am in favor of dividing the lands up into severalty to these people, and in favor of the earliest possible breaking up of the tribal relation and making them citizens in every sense of the word.

XI Cong. Rec. 783-84.

As part of the effort to civilize the allottees, it was expressly provided in the bill that upon issuance of the patent for the allotment, the allottee was to become subject to the laws of the territory or state in which the allotment was situated.[14] What is significant about this provision for purposes of this case is that the allotment of lands and the resultant extension of state law was consistently equated with the dissolution of tribal affairs; that is, the extension of state jurisdiction was to result in the termination of tribal jurisdiction.[15] Thus, it was understood and intended that with the extension of state or territorial jurisdiction upon issuance of a patent, the tribal relations of the allottees were to be, in effect, terminated.[16]

The significance of the foregoing discussion to the present case is readily apparent. It is unreasonable to conclude that

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[14] *S. 1773, supra* at § 6. *See* XI Cong. Rec. 778-79 (Sen. Coke), 875 (Sen. Hoar), 878 (Sen. Coke), 1029 (Sen. Plumb), 1066 (Sen. Kerman), 1067 (Sen. Morgan).

[15] *See, e.g.*, XI Cong. Rec. 785 (Sen. Morgan), 875 (Sen. Hoar), 878 (Senators Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Senators Edmunds and Williams). As Senator Hoar pointed out during the course of the debates on S. 1773

> An Act of Congress may undoubtedly take away that shield, may destroy the tribal relation, and very likely do what this statute in express terms undertakes to do—that is, subject the Indian to State law . . . .
>
> * * *
>
> So if you make an Indian subject to the law of the State, it is not by limiting or by extending the operation of that law; it is by taking away from the Indian the tribal character . . . .

XI Cong. Rec. 1028.

[16] *See e.g.* XI Cong. Rec. 875 (Sen. Hoar), 876 (Sen. Morgan).

Congress intended to terminate tribal authority over individual Indian allottees and at the same time subject non-Indian settlers to tribal jurisdiction. *Cf. Oliphant v. Suquamish Indian Tribe,* 435 U.S. at 203 (discussion respecting significance of 1854 Amendment to the Trade and Intercourse Act). Moreover, it is unlikely that Congress intended that non-Indians entering the reservation would be subject to tribal jurisdiction since the avowed purpose of the bill was, in part, the ultimate destruction of tribal government.[17] Nowhere in the debates on S. 1773 is there any mention or implication of an understanding that the incoming settlers would be subject to tribal jurisdiction.[18] If Congress had contemplated that tribal jurisdiction would extend to non-Indians, express mention would have certainly been made of such. To the contrary,

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[17] In addition, Congress intended that civilization of the Indian population would be facilitated in part by non-Indians who would settle upon the surplus and alienated allotted lands and would thus expose the allottees to the way of civilization. *See e.g.,* XI Cong. Rec. 876 (Sen. Morgan), 877 (Sen. Hoar). *See also* XVII Cong. Rec. 1762-63 (Senators Teller and Dawes); Report of the Secretary of the Interior (1891), p. VI; Report of the Commissioner of Indian Affairs (1891), pp. 46-47; Report of the Secretary of the Interior (1892), p. XXXIII. It would be incongruous for Congress at the same time to intend that the tribes exercise authority over the non-Indians on the fee patented lands.

[18] It must have been contemplated by Congress that the opening of the vast territories encompassed by the Indian reservations to eventual non-Indian settlement could lead to the development predominantly non-Indian towns and communities. In fact, to aid the efforts to settle the vast territories opened during this era, Congress enacted legislation permitting right-of-ways for highways to be established on Indian lands and the condemnation of individual Indian lands for public purposes. Act of March 3, 1901, 31 Stat. 1084, §§ 3 and 4, 25 U.S.C. §§ 311, 357.

Additionally, it is evident from the debates on S. 1773 and similar bills debated in later sessions that Congress knew and understood that after the 25-year alienation restriction had expired, much of the allotted lands would pass to non-Indian ownership. *See e.g.,* XI Cong. Rec. 783 (Sen. Teller), 882 (Sen. Brown), 934 (Sen. Hoar); XVIII Cong. Rec. 974 (Sen. Dolph). *See generally* Collins, *Implied Limitations on the Jurisdiction of Indian Tribes,* 54 Wash. L. Rev. 479, 506-07 (1979).

however, repeated references were made during the debates to making Indian allottees amenable to the laws which governed the incoming settlers.

Review of the legislative materials pertinent to subsequent versions of S. 1773 reveals that the underlying understanding evidenced in regard to that bill prevailed in Congress and thus was carried forth and enacted in the General Allotment Act.[19] For example, Representative Skinner, one of the sponsors of the General Allotment Act in the House of Representatives, stated as follows:

> This means that the tribal relations must be broken up; that the practice of massing large numbers of Indians on reservations must be stopped; that lands must be allotted in severalty. . . .
>
> . . . . Let him [the Indian] become a citizen of the United States and be taught by contact with the white man. And in addition thereto give him his land as is provided in this bill *and extend over him and his property the same protection that is accorded to white men.* . . .

XVIII Cong. Rec. 190-91 (emphasis added.) In addition, it was recognized in the Senate that the bill then before it (the General Allotment Act) had passed the Senate substantially in the same form as in previous sessions of Congress. *See, e.g.*,

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[19] *See e.g.*, XIII Cong. Rec. 3211 (Sen. Conger) and 3212 (Senators Conger and Dawes) (1882); XIV Cong. Rec. 2279-80 (Sen. Coke), 2280 (Senators Dawes and Call) (1884); XVII Cong. Rec. 1630 (Sen. Dawes), 1632 (Sen. Maxey), 1634-35 (Sen. Maxey), and 1762 (Sen. Teller) (1886); XVIII Cong. Rec. 190 (Rep. Skinner), and 191 (Representatives Skinner and Perkins) (1886).

Additionally, S. 1773 was similar to the General Allotment Act in most significant respects. In later sessions, bills essentially identical to the 1887 Act were debated in and passed by the Senate. *See United States v. Mitchell*, —— U.S. ——, 100 S.Ct. 1349, 1354 (1980); S. 1455, 47th Cong., 1st Sess. (1882); S. 48, 48th Cong. 2d Sess. (1883).

XVII Cong. Rec. 1558 and 1559 (Sen. Dawes), 1762 (Sen. Teller). As pointed out by Senator Dawes, the author of and one of the primary spokesmen for the General Allotment Act, "this is a very important bill in reference to the Indians. It has been considered, as I have already said, a great many times in the Senate." XVII Cong. Rec. 1559. Since the bill which was enacted in 1887 was viewed as essentially the same as that considered in earlier sessions and since the underlying assumptions regarding the cessation of tribal relations and the immediate extension of state laws to allottees were the same as in previous sessions,[20] it must be assumed that the intentions and understandings of Congress regarding tribal jurisdiction over non-Indians under earlier versions of the bill were, in effect, carried forth and enacted in 1887.

In light of the history just discussed, the State and Counties believe that the court below was far too narrow in its construction of the Congressional intent in passing the General Allotment Act. It appears that Congress not only contemplated that non-Indian residents would not be subject to tribal regulation on their own property, but that all non-Indians, resident and non-resident, would not be subject to tribal

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[20] Contemporaneous administrative materials respecting the General Allotment Act confirm that the underlying assumptions of Congress in enacting that Act was the same as in previous sessions. *See, e.g.*, Report of the Commissioner of Indian Affairs (1887), pp. VI, VIII-IX; Report of the Secretary of the Interior (1888), p. XXXI; Report of the Commissioner of Indian Affairs (1890), p. VI; Report of the Commissioner of Indian Affairs (1891), p. 6. Thus, as pointed out in the Report of the Secretary of the Interior for 1888,

> A beginning has already been made upon another line of policy, from which much appears justifiably to be hoped—the complete dispersion of the tribes and bands by the establishment of individuals as landowners and the investment of them with the dignity, rights and privileges of citizens in the State and nation.

Id. at XXXI.

regulation on all non-Indian owned lands within the reservation. The exercise of tribal sovereignty in the instant case would therefore be inconsistent with the overriding interests of Congress in opening reservations to non-Indian settlement. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. at 4673.

CONCLUSION

For all of the reasons discussed in this brief, the State and Counties urge that the judgment of the court below be reversed insofar as it grants the Crow Tribe authority to regulate or prohibit the hunting and fishing activities of non-Indians on non-Indian land within the Crow Reservation.

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Respondents.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

I. (a) Does an Indian treaty, which makes no specific reference to the ownership of the beds of navigable rivers running through an Indian reservation, impliedly deprive a subsequently formed state of the ownership of the riverbed to which the state would otherwise be entitled under the equal footing doctrine?

(b) If, under such a treaty, the tribe acquired ownership of the bed of a navigable river, does such tribal ownership continue even after, pursuant to federal law, the lands abutting the river have been sold to non-Indians?

II. May a tribe, in the absence of authorization by either federal statute or treaty, regulate or prohibit hunting and fishing by non-Indians on lands within a reservation after such lands have been sold to non-Indians pursuant to federal law?

STATEMENT OF INTEREST OF AMICUS CURIAE

In the state of Washington there are twenty-three Indian reservations, with most having navigable rivers flowing through them. Much of the land on these reservations has passed into non-Indian ownership, pursuant to the federal policy embodied in various allotment acts, including the General Allotment Act of 1887 (24 Stat. 388). In Washington, statewide, the non-Indian reservation population is approximately 58,000, while the Indian population is approximately 14,000. Thus, the State's interest is two-fold. Besides its interest in the beds of its navigable rivers, there is the even more important interest in the right of a major segment of its population to be free from the authority of a tribal government in which they can have no part.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1868 the United States and the Crow Tribe of Indians entered into a treaty establishing a reservation for the Crows.[1] The heart of the treaty—and, in our view, the heart of this litigation as well— is found in Article II of the treaty:

> "The United States agrees that the following district of county, to wit: [herein follows the description of the reservation boundaries] shall be, and the same is, *set apart for the absolute and undisturbed use and occupation of the Indians* herein named * * * and the United States now solemnly agrees that *no persons*, except those herein designated and authorized so to do, and except such * * * [authorized federal personnel] *shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians* * * *" (Emphasis supplied)

As this language explicitly recognizes, the right of "absolute and undisturbed use and occupation" carries with

---

[1]Second Treaty of Fort Laramie 15 Stat. 649, Pet. Cert. App. 88. The negotiations between the Crows and the United States did not start with the 1868 Treaty, however, nor did they end there. The First Treaty of Fort Laramie was negotiated in 1851. 11 Stat. 749, Pet. Cert. App. 83. Though this Treaty recognized a large tract as Crow lands it did not create a reservation as such. *Crow Tribe of Indians v. United States*, 284 F.2d 361, 151 Ct.Cl. 281 (1960). The 1868 Treaty created the reservation out of a portion of this tract, and the reservation was subsequently reduced by various acts of Congress. 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937).

it the tribal right to exclude non-members from the reservation.

But what is the scope and effect of this tribal right to exclude non-members now, in 1980? The question is especially vexing because of the reversals and counter-reversals of federal Indian policy which have taken place since 1868. However vexing, the question is critical, and provides the common thread which runs through all the major issues to be discussed in this brief.

These issues fall into two sets, corresponding to the two principal holdings of the court below. The first holding is that the ownership of the entire bed of the Big Horn River, as it flows through the Crow reservation, is vested in the United States, as trustee for the Tribe, rather than in the State of Montana. This holding raises the first set of issues, which we caption the "river" issues.

The second holding is that the Tribe has the power to regulate, and in some cases entirely prohibit, hunting and fishing by non-Indians on non-Indian lands and in non-Indian waters. This holding raises the second set of issues, which we caption the "regulatory" issues. But throughout our discussion of all the issues, in both sets, our focus is on Art. II of the treaty.

The River Issues

Under the first set, then, are issues such as these: Does the right of "absolute and undisturbed use and occupation," and the concomitant right to exclude non-members, extend to that portion of a navigable river which flows through the reservation? That is, does Article II empower the Tribe to preclude this portion of the Big Horn from being used as a public highway.[2]

If the Tribe is so empowered, then we would conclude that, at least initially, in 1868, the bed of this portion of the Big Horn was vested in the United States, in trust for the Tribe, and not in trust for the future state of Montana. For the doctrine that the beds of navigable rivers belong to the states is based on the premise that the state is to own the

[2]We borrow the term "public highway" from 33 U.S.C. § 10, discussed at pp. 8-14, *infra*.

rivers for the benefit of the general public. *Pollard v. Hagan*, 3 How. 212 and *Shively v. Bowlby*, 152 U.S. 1. The rationale for applying that doctrine obviously disappears if the Tribe has a treaty right to exclude the non-member public from using the river for navigation.

But conversely, if the Tribe cannot exclude the non-member public and thereby preclude this portion of the river from being used as a public highway, does not any rationale for keeping ownership of the bed in the United States as trustee for the Tribe, rather than in the state of Montana, also disappear?

We urge a rejection of any double standard in the construction of Article II. The language of this Article must have the same scope and meaning when it speaks to the state of Montana as when it speaks to the federal government. More specifically, any construction of the "absolute and undisturbed use and occupancy" language which defeats Montana's interest in the riverbed of the Big Horn must logically defeat the federal government's interest in free navigability of that river's surface as well. After all, the Indian negotiators would be indeed mystified to learn that this language gave them a right to the river bottom, but no right to exclude white settlers from navigating down the river itself.

We show that Article II should not be construed to block off the Big Horn from use as a public highway and thereby defeat this federal interest. Accordingly, neither may Montana's interest in the riverbed be defeated by that same language.

Adoption of a double standard raises a serious constitutional question, in addition to the interpretive question. It would be constitutionally permissible, we agree, for a treaty to deny to a future state any ownership of the riverbed, and simultaneously to deny to the public any right to use that river as a public highway.

In such a case, a river that is navigable in fact would become non-navigable by law; it would be legally blocked off from public use. And the riparian owner—*i.e.*, the Tribe—rather than the future state would then be vested with own-

ership of the riverbed, just as is the case with rivers that are non-navigable in fact.

But the equal footing doctrine, we submit, does not allow the federal government to have it both ways. It cannot allow a river, navigable in fact, to remain open as a public highway, while denying to a state the right enjoyed by the original states; *i.e.*, ownership of the beds of all rivers which are open as public highways.

We next turn to the issue of the effect of various federal allotment acts on the question of ownership of the riverbed. This issue, of course, is reached only if our previous submission regarding the scope of Article II be incorrect.

Even if the treaty vested beneficial ownership of the riverbed in the Tribe, does that tribal ownership continue after the riparian lands have passed into non-Indian ownership, pursuant to these allotment acts? More specifically, can Article II continue to apply to the river, after it has ceased to apply to the adjacent lands? And if it cannot so continue to apply, does not the equal footing doctrine then become operative so as to vest ownership of the riverbed in the state of Montana?

This Court, we show, has answered these questions in *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (*"Puyallup III"*). As *Puyallup III* makes clear, loss of the Indian ownership of the riparian lands makes Article II inapplicable both to those lands and to the river itself; and this results in the loss of ownership of the adjacent riverbed.

The Regulatory Issues

In considering the second set of issues—the "regulatory" issues—our concern is not to determine who owns what, but rather to determine what regulatory powers, if any, the Tribe has over lands which have admittedly passed from Indian to non-Indian ownership.

Though the Tribe no longer has the right to "absolute and undisturbed use and occupation" of these lands, does it still retain some type of regulatory power over the conduct of non-Indians on these lands? More specifically, what legal difference does it make that the regulatory power is being

asserted over non-Indians, rather than Indians? And what legal difference does it make that the conduct being regulated takes place on non-Indian, rather than Indian lands?

Our starting point must once again be the 1868 Treaty with the Crows. We show that any regulatory powers which the Tribe asserts—whether over Indians or non-Indians—must be traceable to that treaty. For in the absence of a statute, executive order, or—as in the case with the Crows—a treaty, by which the United States recognizes the Tribe as a legal entity, that Tribe has no legal powers whatsoever.

This is not to suggest that a federally recognized Tribe derives its governmental powers from the United States, as a city or county, for example, derives its powers from a state. Rather, as *United States v. Wheeler*, 435 U.S. 313, demonstrates, the treaty in effect guarantees to the Tribe that it may continue to exercise its inherent original sovereignty over its own members, just as it did before the coming of the European discoverers.

But what law is to govern non-Indians when they are found, for whatever reason, within the confines of the reservation? We must here make a critically important distinciton. That distinction is best understood on terms of sanctions or enforcement mechanisms.

The Tribe has the power to exclude non-Indians from all reservation lands to which Article II of the Treaty applies. Further, as part of this power, the Tribe may certainly impose conditions on the right of non-members to remain on these reservation lands.

It might condition entry on payment of tax or a license fee, as in *Morris v. Hitchcock*, 194 U.S. 384; or it might impose conditions relating to hunting, fishing or a host of other matters of tribal concern. But the only available sanction for non-compliance with these conditions would be expulsion from the reservation.

In sum: A tribe has all of the usual governmental powers, both civil and criminal over its own members, and may employ all of the usual coercive sanctions in the exercise of these powers. (When we refer to "general governmental power" or the like in this brief, we mean the power to em-

ploy these sanctions.) With respect to a non-member, however, expulsion is the sole available sanction.

To show why this is so, we examine this Court's opinion in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, and demonstrate that the reasoning of this opinion is just as applicable on the civil side as it is on the criminal side of any assertion of general governmental power over non-Indians. We also examine the legislative history of the Indian Reorganization Act of 1934, 48 Stat. 984, to show that Congress has likewise deliberately rejected a policy of vesting general governmental powers civil, or criminal, over non-Indians.

This does not mean, however, that a tribe is powerless to regulate the conduct or activities of non-Indians on Indian lands; rather, it means that expulsion from those lands is the only available means of enforcement.

But does this right to expel, which is squarely based upon Article II of the Treaty, extend to lands which no longer belong to the Indians? We here take up a second critically important distinction.

These lands have been alienated to non-Indians pursuant to federal statutes. We show that the existence of any such right to expel would be completely contrary to the policy embodied in those statutes. We further show that, as made clear by this Court's decision in *Puyallup III*, Article II of the Treaty, which is the source of this power to expel, no longer applies to such lands.

Our conclusion, then, is that the Crow Tribe has neither general governmental power over non-Indians on the Crow Reservation, nor the right to expel non-Indians from non-Indian lands. Accordingly, the regulatory authority assertion by the Crows is unenforceable and invalid.

We test this conclusion, however, in light of this Court's most recent discussion of tribal power over non-Indians, in *Washington v. Confederated Tribes of the Colville Indian Reservation*, ... U.S. ..... (June 10, 1980, No. 78-630). The Court there reaffirmed the existence of tribal power to tax non-Indians. That power, however, was expressly confined to transactions or property located on *Indian* lands. And the authorities cited by the Court in support of that

power involved situations in which the only enforcement sanction invoked was expulsion of a non-Indian's person or property from those Indian lands. Thus, *Colville* supports our analysis and the conclusion to which that analysis leads.

ARGUMENT

I. THE RIVER ISSUES

A. The 1868 Treaty With the Crows Did Not Vest Beneficial Ownership of the Bed of the Big Horn River in the Crow Tribe.

The Big Horn River is a navigable river as it flows through the Crow Reservation. That fact is critical, for the reason stated in *Railroad Co. v. Shurmeir*, 7 Wall 272, 288-289:

> "[T]he court does not hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways."

An example of how explicit Congress made this distinction between "streams navigable and those not navigable" is found in the same statute as this Court relied upon in *Shurmeir*, i.e., § 9 of the Act of May 18, 1796 (1 Stat. 468), formerly Rev. Stat. § 2476, and now 43 USC § 931:

> "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both."

Another example is found in § 12 of the Act of March 3, 1811 (2 Stat. 666), now codified as 33 USC § 10:

> "All the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways."[3]

[3]By its terms, the Act of May 18, 1796 applied only to the Northwest Territory. The Act of March 3, 1811, however, encompassed all territory within the Louisiana Purchase. And that territory includes the Big Horn River.

The status of navigable rivers as public highways has a direct bearing upon the question of state ownership, under the equal footing doctrine, of the riverbed underneath those public highways. *Shively v. Bowlby*, 152 US 1, 49, 50, explains the reason:

> "The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; * * *"

If the Big Horn River, then, is not a public highway as it flows through the Crow Reservation, that is the end of the matter. The rationale for applying the equal footing doctrine would, in our view, disappear.

Let us examine that possibility. Taken in isolation, the language of Article II certainly allows the Tribe to exclude the general public from its reservation. And the geographical description of that reservation not only fails to exclude explicitly the Big Horn River, but expressly includes a portion of another navigable river, the Yellowstone.[4] Nor do we see any constitutional impediment to Congress conferring on the Tribe the power to block off the Big Horn from use as a public highway.

But certainly the proposition that Congress has actually

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[4]Through subsequent reductions by statute, the Yellowstone no longer forms a reservation boundary. See note 1, supra, p. 2. But this, of course, does not resolve the interpretive problem: if part of the Yellowstone, why not the Big Horn?

conferred this power must be rejected. Statutes such as 33 USC § 10 and 43 USC § 931 have not been repealed or amended with respect to the Big Horn River or any other navigable river that flows through an Indian Reservation anywhere in the Nation.

Indeed, even in the one case in which this Court has held that an Indian Tribe owns the bed of a navigable river, the public right of navigation was found to be still intact. *Choctaw Nation v. Oklahoma*, 397 US 620, 635. In finding that right, the Court relied upon the doctrine of an implied federal navigational easement, arising under the Commerce Clause, rather than upon a specific statute such as 33 USC § 10. The Court's reluctance, exemplified in *Choctaw*, to give a Tribe control over public navigation on an otherwise navigable river should be even greater when, as here, Congress has explicitly declared that a river such as the Big Horn shall be forever open as a public highway. 33 USC § 10.

The language of Article II, then, cannot be applied literally to the Big Horn, as the Tribe and the United States would apparently apply it. But can that language, perhaps, be applied selectively, so as to defeat the State's interest in the bed of the river, while preserving the federal government's interest in unimpeded public navigation? No such double standard should be attributed to either the negotiators of the treaty or to the Senate which ratified that treaty.[5] The language of Article II should be given a consistent meaning, both when it speaks to the State and when it speaks to the Federal Government.

> "* * * [D]isposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 US 49, 55.

Any intention to vest in the Crow Tribe the right of "ab-

[5]The Indian negotiators, we agree, can hardly have been expected to be familiar with the equal footing doctrine. Neither were they familiar with another constitutional doctrine, that of a federal navigational easement arising under the commerce clause. Yet that hardly prevents application of the latter constitutional doctrine, as shown in *Choctaw*. Similarly, it should not prevent application of the former doctrine here.

solute and undisturbed use and occupation" of a riverbed, while simultaneously depriving the Tribe of the same right over the river's surface, is hardly "very plain" from the language of Article II. However generous one's standards for determining "plainness" might be, those standards should require some consistency in the application of Article II's language.

The task, then, is to find a meaning for Article II of the 1868 Treaty which accommodates both the federal government's interest in the surface of the Big Horn River, and Montana's interest in the riverbed. And, no less importantly, that accommodation must also give meaning and effect to the language of Article II establishing the midchannel of a navigable stream, the Yellowstone, as the reservation boundary. (See note 4, *supra*, p. 9.)

Martin v. Waddell, 16 Pet. 367, provides the key to this accommodation. At issue in *Martin* were conflicting claims to land under tidewater in New Jersey. One claim derived from royal charters granted in 1664 and 1674 to the Duke of York; the other derived from a grant by the State of New Jersey, pursuant to an 1824 statute. The charters conveyed the territory involved,

> "* * * together with all the lands, islands, soils, rivers * * * and all the estate, right, title, interest, benefit and advantage, claim, and demand of the King, in the said land and premises." 16 Pet. at 408.

The charters also conveyed full powers of government to the Duke.

Despite the very precise and very plain language of the charters—a conveyancer would be hard to put to make it plainer—this Court held that the King had conveyed to the Duke no private property rights to the lands under tidewater. While private property rights were certainly conveyed with respect to other lands, only governmental powers were conveyed with respect to the lands under navigable waters, and the private property rights in such lands passed to the State of New Jersey.

We do not dispute that Article II vests certain rights over the Big Horn River in the Crow Tribe. So far as the

Tribe's governmental power over its own members is concerned, for example, it matters not whether that member is on the river or on dry land. All that matters is that he be within the exterior boundaries of the reservation.

However, just as with the charters involved in *Martin v. Waddell*, property rights under Article II of the Treaty do not extend to the land under navigable waters; those property rights are reserved for the future state of Montana, just as they were reserved for the future state of New Jersey.

The accommodation which we suggest avoids a serious constitutional problem which would arise under the use of any double standard. That problem arises if the federal government attempts to have it both ways, by maintaining the status of a navigable river as a public highway, open to use by all, while conveying away the interests of the future state in the bed of that same river.

Although *Shively v. Bowlby* rejected the statement in *Pollard v. Hagan*, 3 How. 212, that Congress had no power at all to convey away a future State's interest in the bed of a navigable river, *Shively* also made it clear that such a power is not unlimited. The determining factor is the purpose of the conveyance.

> "We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." 152 US at 48.

Nor can one doubt that providing a reservation as a homeland for the Indians is one of those other appropriate public purposes. But when a navigable river is kept open as a public highway, while the riverbed is conveyed away, that conveyance is not rationally related to the purpose of providing that reservation homeland. To the extent that the Indians cannot keep the public off the river, to that ex-

tent it is not "reserved" for them at all. And to that same extent, it is not "appropriate" to the object of establishing the reservation.

B. Even if Article II of the Treaty Vested Beneficial Ownership of the Bed of the Big Horn River in the Tribe, Subsequent Alienation of Riparian Lands Along the River Divested the Tribe of That Ownership over the Adjacent Portions of the Riverbed.

If our prior submission be incorrect, and if Article II of tthe 1868 Treaty vested beneficial ownership of the bed of the Big Horn in the Tribe, what is the effect of a subsequent alienation to non-Indians of adjacent riparian lands? Approximately 30% of the reservation lands have been sold to non-Indians—including lands abutting the Big Horn.[6]

In *Puyallup Tribe v. Washington Game Department*, 433 US 165 ("Puyallup III"), a similar question was before this Court. Specifically, the question was whether the State had jurisdiction to regulate, in any manner, on-reservation steelhead fishing by Tribal members.

As stated by the Court:

> "The Tribe vigorously argues that the majority of its members' netting of steelhead takes place inside its reservation, and that, while our prior adjudications settled respondent's right to regulate off-reservation fishing in the interest of conservation, neither respondent nor the state court has jurisdiction over on-reservation fishing. The Tribe relies on both the Treaty of Medicine Creek, 10 Stat. 1132 (1854), and federal pre-emption of on-reservation Indian affairs, see Mescalero Apache Tribe v. Jones, 411 US 145, 147-148, 433 US 173, 174."

The Court disposed of the Tribe's argument as follows:

> "Article II of the Treaty of Medicine Creek provided that the Puyallup Reservation was to be 'set apart, and so far as necessary, surveyed and marked out for their exclusive use' and that no 'white man [was to] be permitted to reside upon the same without permission of the tribe and the superintendent or agent.' It is argued that these words amount to a reservation of a right to

[6]Such sales were made pursuant to the General Allotment Act of 1887, 24 Stat. 388, or the Crow Allotment Act of 1920, 41 Stat. 751.

fish free of state intereference. *Such an interpretation clashes with the subsequent history of the reservation and the facts of this case.* Pursuant to two Acts of Congress, 27 Stat 633, and c 1816, 33 Stat 565, the Puyallups alienated, in fee simple absolute, all but 22 acres of their 18,000-acre reservation. None of the 22 acres abuts on the Puyallup River. *Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive use'.*" 433 U.S. 174 (Emphasis supplied)

In footnote 12, the Court had more to say about the river:

> "Counsel for petitioner [Puyallup Tribe] intimated at oral argument that petitioner might contend in the future that it retained trust status title to the bed of the Puyallup River, Tr. of Oral Arg 10. This contention is at odds with the otherwise uncontradicted findings below." [i.e., the findings that all but 22 acres had been alienated]

Article II of the Treaty of Medicine Creek, the counterpart of Article II of the 1868 Treaty, no longer applies to the Puyallup River—if it ever did in the first place.[7] And this is because Article II is no longer applicable to any of the riparian lands.

Once riparian lands—or any reservation lands for that matter—are alienated to non-Indians, Article II no longer applies to those lands. The right of "absolute and undisturbed use and occupation" has obviously been terminated with respect to those lands. And just as obviously, when terminated with respect to riparian lands, the application of that Article to the adjacent riverbed has been terminated as well.

II THE REGULATORY ISSUES

A. Introduction.

The action of the Crow Tribe which prompted this phase of the litigation was very simple: By ordinance, the Tribe prohibited any hunting and fishing, anywhere within the exterior boundaries of the reservation, by anyone other

[7]We do not know to what extent, if any, the Puyallup River was navigable in 1854, when the Treaty of Medicine Creek was negotiated.

than a tribal member. (Tribal Resolution No. 74-05, Pet. Cert. App. 119) What remained, however, of that tribal action after review by the Court of Appeals is less simple.

First, the prohibition was held valid with respect to non-member hunting and fishing on Indian lands, tribal or allotted. (Pet. Cert. App. 10-12) That holding is not here questioned.

Secondly, the prohibition was also held valid with respect to non-member hunting and fishing on non-Indian lands, but with one exception. The prohibition was held invalid with respect to non-members who hunt or fish, *but only when doing so on tracts on which they reside.* (Pet. Cert. App. 15)

Thirdly, even non-member residents hunting and fishing on the land on which they reside are subject to tribal regulation, though they are free of the complete tribal prohibition. (Pet. Cert. App. 16-23)[8] Such regulation might include fees, bag limits and season limits. (Pet. Cert. App. 20, 21)

What is the source of this tribal power, upheld by the Court of Appeals in the second and third holdings? Unfortunately, the Court's opinion (Pet. Cert. App. 2-26) does not really address this fundamental question.[9]

In the remainder of this brief, however, we focus entirely in this question. In so doing, we anticipate that the Tribe and the United States will attempt to uphold the second and third holdings on a theory of inherent tribal sovereignty; accordingly, we discuss that theory in some detail, and show why it will simply not serve.

B. The Central Role of the Treaty.

There exist in the United States Indian tribes which have not been recognized as such by the federal government through either a treaty, a statute or executive order. See e.g.,

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[8]The Court also upheld Montana's concurrent power to regulate hunting and fishing by non-members, anywhere within the reservation, thus establishing a dual system of regulation. (Pet. Cert. App. 21)

[9]The opinion does, however, focus on the important question of the sanctions available to the Tribe for enforcing its regulation of hunting and fishing against non-members. We focus on this question as well, because it is so closely connected with the question of the source of the tribal power to impose the regulation in the first place.

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 and *Duwamish et al Indians v. United States*, 79 Ct. Cls. 530, cert. den. 295 U.S. 755.

So long as such tribes remain in that status, their members are legally indistinguishable from any other citizen. Though racially different, they are not legally different. Cf., *Morton v. Mancari*, 417 U.S. 535. They are subject to state laws as fully as anyone else, and the tribe has no legal authority over them at all.[10]

This is not to say, however, that through a treaty the United States delegates its power to an Indian tribe, or confers power on that tribe in the way a state delegates or confers power upon a municipal corporation. As *United States v. Wheeler*, 435 U.S. 313 makes clear, a treaty *preserves* the Tribe's own pre-existing power; it does not confer a new power. But without a treaty, or other form of federal recognition, that power is not preserved.[11]

As stated in *Wheeler*:

> "[W]e have said that [i]mplicit in these treaty terms * * * was the understanding that the internal affairs of the Indians *remained* exclusively within the jurisdiction of whatever tribal government existed." *Williams v. Lee*, 358 US 217, 221-222." (Emphasis supplied)

Before the European discoverers came, "whatever tribal government existed" quite obviously, was the *only* government that existed. No one else governed the Indians. The treaty terms in effect guaranteed that this *status quo ante* was to continue, albeit within a limited geographical area termed a "reservation."

The specific treaty terms referred to in *Williams v. Lee* are the counterpart of Article II of the 1868 Treaty with the

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[10]An unrecognized tribe is not forever locked into this status. See 25 CFR Part 54. "Procedures For Establishing That An American Indian Group Exists As An Indian Tribe." And a new reservation can be created as well under 25 U.S.C. § 467.

[11]Thus, it is misleading to say that Indian tribes retain all their inherent sovereign powers except to the extent they have been taken away by statute or treaty. The statement is correct *only* if there is a treaty or other form of federal recognition in the first place. In the absence of such recognition, the tribe retains no powers at all. To use the terminology of 25 CFR Part 54, such a tribe is only an Indian "group" and not a tribe. See note 10, *supra*.

Crows, as the immediately preceding sentence in *Williams v. Lee* makes clear:

> "* * * In return for their promises to keep peace, this treaty [with the Navajos] 'set apart' for 'their permanent home' a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. * * *" 358 U.S. at 221.

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 174, this exact same treaty language was found to be the basis for the immunity of a reservation Navajo from Arizona's tax laws. Thus in *Williams, Wheeler*, and *McClanahan*, this Court went directly back to the terms of the treaty to find either the basis of a tribal power or the basis of an immunity from an assertion of state power. The Court should do so once again in this case, to see if the power claimed really exists.

As *Wheeler* shows, the tribal governmental power over its own members which is preserved by the treaty is true governmental power; that is, it includes all of the sanctions available to other governments, such as the federal government and the states, in enforcing its laws. Thus, a tribe can subject its members to its courts, incarcerate or fine them, and seize and forfeit their property. Further, it matters not whether the laws, the court proceedings, and the enforcement sanctions be viewed as "civil" or "criminal." The Crow Tribe, of course, has this full range of sanctions available to enforce its laws over its own members, by reason of Article II of the Treaty.[12]

But what powers does a tribe have, under Article II, over non-members? We now reach a critical question. The tribe certainly has the power to expel those non-members from lands within the scope of Article II. The language of Article II is unmistakably clear on that point. But can the Tribe employ, with respect to non-members, all the other sanctions that it can employ with respect to its members? Or is it limited to the sanction of expulsion? We take up this question next.

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[12]The Indian Civil Rights Act, 25 U.S.C. § 1302, however, has limited the severity of some sanctions.

C. Under Oliphant v. Suquamish Tribe, the Only Available Sanction Against a Non-member for Violation of a Tribal Law or Regulation is Expulsion.

Before examining the principles established by the Court's decision in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, we should note what *Oliphant* did *not* decide. It did not decide that the Suquamish Tribe could not prohibit Mr. Oliphant and Mr. Belgarde, the alleged offenders, from ever again coming onto Indian lands within the Port Madison Reservation, and forcibly eject them should they do so.[13] *Oliphant*, in short, was not an expulsion case. Rather, *Oliphant* was a case in which the tribe claimed the power to impose on a non-member the full range of criminal sanctions, for violation of its laws, that it could admittedly impose on its members.

Does the reasoning by which this result was reached apply on the civil, as well as the criminal, side of a tribal assertion of general governmental power against a non-member? We here show that it does.

The structure of the opinion should here be noted. The first part examines the commonly shared presumption of Congress, the Executive Branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. 435 U.S. 196-206. That presumption, however, is "not conclusive on the issue before us," but is entitled to "considerable weight". 435 US at 206. Neither is the second part, which reviews the relevant treaty provisions, conclusive either. 435 US at 208. The conclusive part is the third, which begins:

> "But an examination of our earlier precedents satisfies us that, *even ignoring treaty provisions and congressional policy*, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." (Emphasis supplied) 435 at US 208.

The third part *is* conclusive, independently of the first two. Significantly, none of the precedents examined in this

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[13]Of course, the Indian Civil Rights Act, 25 U.S.C. § 1302, might well require that basic due process, such as an opportunity for a hearing, be afforded before any such expulsion is effective.

third part directly involved the question of tribal jurisdiction over non-Indians, either civil or criminal. They did involve, however, the status of Indian tribes.

That status is one of subordination to and dependency upon the United States; it affects not only the relationship of the Indian Tribes with the United States Government as such, but the relationship of the Tribes with the non-Indian United States citizen as well.

> "* * * Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished." *Johnson v. M'Intosh*, 8 Wheat 543, 574, 5 L.Ed. 681 (1823)." *Oliphant* 435 U.S. at 209

And this diminishment of tribal sovereignty resulted in the loss of the tribal power to govern anyone but the Indians themselves.

> "In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows:
>
> > [T]he restrictions upon the right of soil in the Indians amount * * * to an exclusion of all competitors (to the United States) from their markets; and the limitation upon their sovereignty amounts to the right of *governing every person within their limits except themselves.*
>
> *Fletcher v. Peck*, 6 Cranch 87, 147." (Emphasis in original.) *Oliphant*, 435 U.S. at 209.

Obviously, what Mr. Justice Johnson was talking about in *Fletcher v. Peck* was the power of *governing*, whether the forms of governing be characterized as civil or criminal.

The opinion continues:

> "[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on

> their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. * * *"

Oliphant, 435 U.S. at 209, 210.

Simply because an assertion of governmental power is "civil" rather than "criminal" does not mean that the hazards to a United States citizen, and the risk to his personal liberties, are any less.

To illustrate: Perhaps the most pervasive and fundamental assertion of governmental power, on the civil side, is the taxing power. The federal government, states, and local governments collect these taxes through voluntary compliance in most cases, but through compulsory enforcement mechanisms when necessary. Those enforcement mechanisms or sanctions include subjection of the taxpayer to the government's courts, forcible seizure of the taxpayer's property, and punishment of the taxpayer for non-compliance. That punishment might be through criminal proceedings; but it might be through civil fines as well; and civil proceedings might involve incarceration, for civil contempt.

It makes little difference to the taxpayer that he has lost his property or liberty through "civil" rather than "criminal" proceedings.

Nor did the holding in *Oliphant* rest upon such a distinction, as the discussion of *Ex Parte Crow Dog*, 109 U.S. 556, clearly shows. The United States was there attempting to extend federal criminal law:

> "* * * by argument and inference only, * * * over aliens and strangers; over the members of a community separated by race [and] tradition, * * * from the authority and power which seeks to impose upon them the restraints of an external and unknown code * * *; which judges them by a standard made by others and not for them. * * * It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by * * * a different race, according to the law of a social state of which they

> have an imperfect conception. * * *" 109 U.S. at 571. Quoted at 435 U.S. at 210, 211.

After this quotation, the Court in *Oliphant* continued:

> "These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs."

Oliphant, 435 U.S. 210, 211.

The rationale of *Crow Dog*, as applied in *Oliphant*, logically applies to *all* tribal law. Whether that law be criminal or civil, it is equally "external and unknown" to non-Indians.

Historically, the Indian tribes have argued that they have the status of separate nations, with their own inherent governmental power over their own members. As shown by such cases as *Talton v. Mayes*, 163 U.S. 376, *United States v. Wheeler* and *Crow Dog* itself, that argument has uniformly met with success. But, under *Oliphant* it is *precisely because of this separateness* that this power of Indian tribes must be confined to tribal members, and not be extended to non-Indians.

Two last points: as already suggested, *Oliphant* in no way affects a Tribe's treaty right to exclude or expel non-Indians. It does, however, prohibit an assertion of general governmental power, be that assertion categorized as "criminal" or "civil", in which the other usual sanctions or enforcement mechanisms are sought to be utilized by the Tribe.

Secondly, *Oliphant* in no way affects the power of Congress to delegate to Indian Tribes governmental power over non-Indians. But Congress, in fact, has refused to do so, except in very narrow circumstances, as we shall next see.

D. In Adopting the Indian Reorganization Act of 1934, Congress Deliberately Denied to Indian Tribes Any General Governmental Power Over Non-Indians.

The Indian Reorganization Act, as originally introduced in Congress, was very different from the bill that eventually passed. (Act of June 18, 1934, 48 Stat. 984.) Those differ-

ences are of great significance here. The original version was introduced in the House as H.R. 7902, 73rd Cong., 2nd Sess. (1934) and in the Senate as S. 2755, 73rd Cong., 2nd Sess. (1934).

The heart of the bill was Title I, "Indian Self-Government." Section 2 of Title I read, in pertinent part, as follows:

> "In accordance with the foregoing purposes, the Secretary of the Interior is hereby authorized *to issue* to the Indians residing upon any Indian reservation or reservations or subdivision thereof *a charter granting to the said community group any and all such powers of government * * * as may seem fitting in the light of the experience, capacities, and desires of the Indians concerned * * **" (Emphasis supplied)

Section 4 spelled out in more detail the powers which were to be included in the charter. The first is found in subsection (a):

> "(a) To organize and act as a *Federal municipal corporation*, to establish a form of government, to adopt and thereafter to amend a constitution, and to promulgate, and enforce ordinances and regulations for the effectuation of the functions hereafter specified, *and any other functions customarily exercised by local governments.*" (Emphasis supplied)

Subsection (d) granted another important power:

> "(d) To establish courts *for the enforcement and administration of ordinances of the community,* which courts shall have *exclusive jurisdiction over all offenses of, and controversies between, members of the chartered community, under the ordinances of such community, and jurisdiction exclusive or non-exclusive over all other cases arising under the ordinances of the community*, and shall have power to render and enforce judgments, criminal and civil, legal and equitable, and to punish violations of local ordinances by fine not exceeding $500, or in the alternative, by imprisonment for a period of not exceeding six months: * * *." (Emphasis supplied)

Title IV of the bill also dealt with courts, establishing a Court of Indian Affairs. Section 3 of this Title spelled out the broad jurisdiction of that court, which included jurisdiction "of all cases, civil or criminal, arising under the laws

and ordinances of a chartered Indian community, wherein a real party in interest is not a member of such community." (Subsection 4)

Clearly, a chartered Indian community was to have broad legislative jurisdiction over non-members—as broad as those of any municipal corporation or other unit of local government. And the tribal courts and the Court of Indian Affairs would have jurisdiction over non-members as well.

Title I and Title IV did not survive. And a major reason was that the chairman of the Senate Committee on Indian Affairs, Senator Wheeler from Montana, was adamantly opposed.

In the hearing on S. 2755, the following exchange took place concerning Title I:

> "The Chairman. Well, you might possibly, Mr. Commissioner, get, for instance, some tribe of Indians in Montana who would want to try this, and they might get a sufficient number of signers to a petition to have a charter issued.
>
> "Commissioner Collier [of the Bureau of Indian Affairs]. Yes.
>
> "The Chairman. But if they did do it, in my judgment, it would bring about all kinds of conflicts between your Indians and the white people, and, in addition to that, it would set back the Indians, in my judgment, considerably by doing it, and I am afraid that it would lead to conflicts in the Northwest between the Indians and the whites.
>
> "I mean, supposing the Indian Bureau went out there, for instance, if you had this provision in there; your Indian Bureau could go out there and take those Indians possibly and propagandize them and get sufficient numbers of them to sign it and issue a charter, and then attempt to set up this government within a government out there, which would be, in my judgment, a serious mistake on the part of the Indians to do it." Hearing Before the Committee on Indian Affairs, United States Senate on S. 2755, 73rd Congress, 2nd Sess. (1934) p. 68 (hereinafter "1934 Hearings").

Senator Wheeler liked the proposed court system in Article IV no better. Under discussion was an amendment,

proposed by the BIA, involving the criminal jurisdiction of the court:

> "Commissioner Collier. Mr. Chairman, this amendment would leave with the proposed new court of Indian affairs all prosecutions for crimes insofar as they are prosecutions under the laws affecting Indian country.
>
> The Chairman. Yes; but it is perfectly ridiculous to set up this separate court." 1934 Hearings, p. 205.

The discussion then turned to the jurisdiction of the court, in the case of a non-Indian trying to collect a debt from an Indian. And Senator Wheeler expressed his views about the proposed court once again:

> "The Chairman. If you ever get this through Congress I will be surprised, because it is perfectly ridiculous in my judgment.
>
> "Senator O'Mahoney. Senator, I don't think you agree with this provision.
>
> "The Chairman. Well, I certainly do not agree with it, and I do not think the Indians if they understood it in the Northwest would want it, because of the fact that it would just simply hamper them and retard them rather than do them any good.
>
> "Commissioner Collier. Mr. Chairman, we have explained that we did not regard this section as an integral part of the bill, as indispensable at all.
>
> "The Chairman. Yes; I am glad of that." 1934 Hearings, p. 208.

What happened next is best explained in Senator Wheeler's own words:

> "The Chairman. * * * I got together with the Commissioner of Indian Affairs and went over the important points that I thought were in controversy, and yesterday they sent up this bill, which eliminates, it seems to me, practically all of the matters that are in controversy, * * *" 1934 Hearings, p. 237.

The bill which the BIA sent up was the bill which ultimately passed. (Compare S. 3645, reproduced at 1934 Hearings, p. 234, and Act of June 18, 1934, 24 Stat. 984). Thus the Congress, in 1934, denied to the Indians the broad, general governmental powers over Indians and non-Indians which the BIA had hoped to attain for the Indians. And that fact

is sufficient reason for this Court to deny the claim to any such powers now.[14]

E. The Scope of the Power to Expel Non-Indians, Under Article II of the 1868 Treaty, is Confined to Indian Lands.

Approximately 30% of the lands within the Crow Reservation has been sold to non-Indians, pursuant to the General Allotment Act of 1887, 24 Stat. 388, or the Crow Allotment Act of 1920, 41 Stat. 751. Does the tribal right to expel apply to these lands?

Puyallup III, 433 U.S. 165, conclusively shows that it does not, for reasons we have already discussed: Article II simply does not apply to these lands anymore. See pp. 13-14 *supra*. Any interpretation of Article II which would allow such a right to expel "* * * clashes with the * * * history of the reservation and the facts of this case." 433 U.S. at 174.[15]

Let us examine the history of the allotment policy more closely as it affected the Crow, the Puyallup and many other reservations.

Pursuant to a series of acts, the most important of which is the General Allotment Act of 1887, 24 Stat. 388, the reservations were broken up into allotments for individual tribal members, which were then frequently sold to non-Indians.

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[14]In sharp contrast with the broad provisions of S. 2755 are such statutes as 18 USC 1165, relating to unauthorized hunting or fishing on Indian lands; 18 USC 1161, relating to sale of liquor on Indian reservations; and 42 USC 7474, relating to determination of air quality standards for reservation lands. In each of these statutes, Congress has empowered Tribes to determine what conduct is or is not lawful on reservation lands, including, in the case of the last two statutes, non-Indian lands. And those determinations affect the conduct of both Indians. and non-Indians.

But these statutes are narrowly structured: enforcement is left only to the federal government, and the subject matter is in each case very specific. Far from reflecting a congressional assumption of general criminal or civil tribal governmental power reservation-wide, over Indians and non-Indians alike, they reflect exactly the opposite assumption.

[15]The Court below correctly realized that the sale of lands to non-Indians pursuant to these allotment acts somehow restricted the power of the Tribe to impose and enforce its regulation against non-Indians on Indian lands. See, Pet. Cert. App. 15. Hence, its complicated holdings in partly upholding and partly invalidating that regulation. The Court's error, however, stemmed from its failure to see that these acts completely eliminated that power, by making Article II of the Treaty completely inapplicable to those lands.

"Surplus" lands, remaining after the allotments had been made, were sold as well.

This change in land policy was but part of a larger change. The new federal policy was nothing less than the complete integration of Indians into non-Indian society. This policy change was described by the Court in *Oliphant*:

> Today, many reservations, including the Port Madison Reservation, have extensive non-Indian populations. The percentage of non-Indian residents grew as a direct and intended result of congressional policies in the late 19th and early 20th centuries promoting the assimilation of the Indians into the non-Indian culture.

Oliphant, 435 U.S. at 202, n. 13.[16]

As a central part of this policy of assimilation, Indians were to become subject to non-Indian law.[17] As stated in § 6 of the General Allotment Act:

> "Each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside."

A non-Indian settling on an Indian reservation, pursuant to this new federal policy, was thus told by the Congress that his Indian neighbor would become subject to state law, and not that he would become subject to the law of his Indian neighbor.

Most certainly, then, Congress did not contemplate that Indians would have the power to control the conduct of non-Indians on non-Indian lands, through either expulsion or any other sanction.[18]

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[16]For an extended treatment of allotment policy, see D. Otis, History of the Allotment Policy, in Readjustment of Indian Affairs, Hearings on HR 7902 Before the House Committee on Indian Affairs, 73rd Cong., 2nd Sess., 428-40 (1934).

[17]As stated in *Draper v. United States*, 164 U.S. 240, 246, a case involving the Crow Reservation, § 6 would bring it about that " * * * the Indians themselves would have passed under the authority and control of the state."

[18]Other statutes besides the allotment acts may restrict the tribal right to expel non-Indians. Thus, a non-Indian may be on Indian land, under an easement or lease agreement approved by the Secretary of Interior, pursuant to 25 U.S.C. §§ 323 or 415. So long as the terms of the easement or lease agreement are complied with by the non-Indian in possession, the congressional policy embodied in those statutes would certainly preclude any attempt to expel him.

F. Washington v. Confederated Tribes of Colville Indian Reservation, U.S. (June 10, 1980, No. 78-630) Demonstrates That Any Tribal Power Over Non-Indians Must Be Confined to Indian Lands and That Expulsion From Those Lands Is the Only Available Sanction.

In *Colville*, this Court held that Indian tribes have the power to impose a cigarette tax on non-tribal purchasers. Slip Op. 15-17. Is that holding consistent with our submission? The Court's discussion shows clearly that it is.

> "The power to tax transactions occurring *on trust lands* and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." (Emphasis supplied; Slip Op. 15)

And again:

> "*Authority to tax the activities or property of non-Indians taking place or situated on Indian lands,* in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934. 48 Stat. 987, 25 U.S.C. § 476. (Emphasis supplied; Slip Op. 16)

The Court did not discuss the question of sanctions, and for good reason. If the non-Indian purchasers did not want to pay the tax, the smoke shops would not sell them cut-rate cigarettes. The sanction was simple, but effective.

The question of sanctions was involved, however, in the authorities cited by the Court in *Colville*. Thus, in 17 Op. Att. Gen. 134 (1881), "Intruders on Lands of the Choctaws and Chickasaws," the question was whether non-Indians who were on lands of these Indians without complying with their permit laws could be forcibly removed therefrom by the Department of Interior. The answer, of course, was that they could.

In 7 Op. Atty. Gen. 174 (1855), one of the questions was whether an Indian court had civil jurisdiction over a white man who had *voluntarily made himself a member of the Chickasaw Nation, and was exercising all the rights of a Chickasaw*. Again, the answer was yes.

In 23 Op. Atty. Gen. 214 (1900), "Trespassers on Indian Lands," the question again was whether a non-member could be forcibly removed by the United States for failure to pay a tribal permit or license fee on the non-member's business. Again, the answer was yes.

And in 55 I.D. 14, 46 (1934), the portion of the decision quoted by the Court refers to taxing power "* * * over non-members, so far as such non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." (Slip Op. 16) And those privileges, obviously, are those of conducting a trade or residing on Indian lands, from which they may be removed for not paying the taxes which have been "attached as conditions" to those privileges.

The three decisions cited in *Colville*, *i.e.*, *Buster v. Wright*, 135 F. 947 (CA8 1905), appeal dismissed. 203 U.S. 599 (1906); *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (CA 8 1956); and *Morris v. Hitchcock*, 194 U.S. 384, were all removal cases.

One last point regarding the Executive Branch's understanding of the scope of tribal power over non-Indians: even as late as 1934, that understanding was identical with our basic submission here. In an opinion of the Solicitor of the Department of Interior, December 13, 1934, interpreting the newly enacted Indian Reorganization Act, one question presented was the right of a tribe to condemn the property of a tribal member. The opinion stated:

> "It is proper to add that since the tribal power of condemnation is based, in the first instance, upon tribal jurisdiction over the members of the tribe, it ceases to exist where an Indian abandons his tribal membership; and as was said in the opinion of this Department on 'Powers of Indian Tribes,' * * * 'any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses.' * * *
>
> *"Threatened oppression in the form of condemnation, taxation, or other incidents of social control may be avoided by the termination of the landowner's tribal status. But if he remains to share in the benefits of tribal life he must bear its burdens.*

> "The restricted land of the Indian who has severed his tribal affiliation is not subject to tribal condemnation proceedings under tribal law." Op. Sol. I.D., Ind. Aff. Vol. 1, 484, at 490. (Emphasis supplied)

As this opinion explicitly recognizes, a tribal claim of general governmental power, even on the civil side, is valid only with respect to tribal members. With respect to non-members, our system of government simply has no room for "threatened oppression" in the form of "incidents of [tribal] social control" over those non-members. They do not share in the benefits; nor do they bear the burdens.

CONCLUSION

For the reasons discussed herein, the decision of the Court of Appeals should be reversed.

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